JULY/AUG 2023

INDIANA STATE BAR ASSOCIATION

RES GESTÆ

MEMBER JOURNAL



FEATURING

KNOTS, LOCS, AND LAW: A LEGAL AND SOCIAL PERSPECTIVE ON THE CROWN ACT AND THE RIGHT TO WEAR NATURAL HAIR

PLUS

When Is An Oath Not An Oath?

Social Media and 'Friending' Judges, Jurors, and Other Parties

and More

VOL. 67 NO. 1

LawPay®

AN AFFINIPAY SOLUTION

+

Indiana State Bar Association

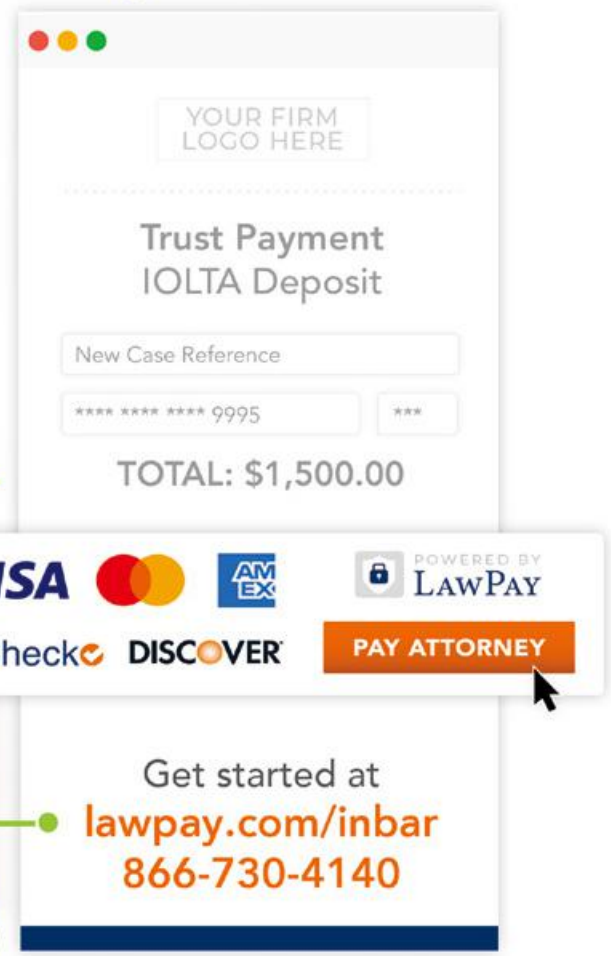
Member Benefit Provider

> **I love LawPay!** I'm not sure why I waited so long to get it set up.
>
> – *Law Firm in Ohio*

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- **22% increase in cash flow with online payments**
- **Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA**
- **62% of bills sent online are paid in 24 hours**





Get started at
lawpay.com/inbar
866-730-4140

Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Synovus Bank, Columbus, GA., and Fifth Third Bank, N.A., Cincinnati, OH.

RES GESTÆ

VOL. 67 NO. 1
JULY/AUG 2023



12 **KNOTS, LOCS, AND LAW**

Knots, Locs, and Law: A Legal and Social Perspective on the CROWN Act and the Right to Wear Natural Hair
By Taylor Ray Cook, Raymond P. Dudlo, and Rhea M. Jones-Price

CONTENTS

PUBLISHER STATEMENT: Res Gestae (USPS–462 500) is published monthly, except for Jan/Feb and Jul/Aug, by the ISBA. Periodicals postage paid at Indianapolis and additional mailing offices.

POSTMASTER: Send address changes to Res Gestae, c/o

ISBA, 201 N. Illinois St., Suite 1225, Indianapolis, IN 46204.

DISABILITIES: If you have a disability which requires printed materials in alternate formats, please call 800/266 2581 for assistance.

Publication of advertisments is not an implied or direct endorsement of any product or service offered.

ISBA STAFF

Associate Executive Director:
Carissa Long • clong@inbar.org

Assistant CLE Director:
Christine Cordial • ccordial@inbar.org

Communication Coordinator:
Abigail Hopf • ahopf@inbar.org

Director of CLE:
Kristin Owens • kowens@inbar.org

Director of Communications:
Kelsey Singh • ksingh@inbar.org

Director of Finance & Operations:
Sarah Beck • sbeck@inbar.org

Director of Meetings & Events:
Ashley Higgins • ahiggins@inbar.org

Executive Director:
Joe Skeel • jskeel@inbar.org

Legislative Counsel:
Paje Felts • pfelts@inbar.org

Meetings & Events Coordinator
Peggy Gotsis • pgotsis@inbar.org

Membership Coordinator:
Julie Gott • jgott@inbar.org

Office Manager:
Kimberly Latimore Martin • klatimore@inbar.org

Receptionist:
Chauncey Lipscomb • clipscomb@inbar.org

Section & Committee Liaison:
Rebecca Smith • rsmith@inbar.org

Section & Committee Manager:
Leah Baker • lbaker@inbar.org

INDIANA STATE BAR ASSOCIATION
201 N. Illinois St., Suite 1225, Indianapolis, IN 46204
800-266-2581 • www.inbar.org

The Indiana State Bar Association empowers members to thrive professionally and personally through advocacy, education, and connections.



22 **WHEN IS AN OATH NOT AN OATH?**

When Is An Oath Not An Oath? It's Time to Revisit Admission and Discipline Rule 22
By Hon. Gary L. Miller

28 **SOCIAL MEDIA**

Social Media and 'Friending' Judges, Jurors, and Other Parties
By Cari Sheehan

32 **RECOVERY**

Because I'm a Recovering Bulimic...
By Donna J. Bays

EDITOR / ABIGAIL HOPF ahopf@inbar.org
COPYEDITOR / REBECCA TRIMPE rebeccatheditor@gmail.com
GRAPHIC DESIGN / LLM PUBLICATIONS info@llmpubs.com
WRITTEN PUBLICATIONS COMMITTEE CO-CHAIRS / JUDGE M. VORHEES & MELISSA KEYES wpc@inbar.org
ADVERTISING / KELSEY SINGH ksingh@inbar.org

Opinions expressed by bylined articles are those of the authors and not necessarily those of the ISBA or its members. ©2023 by the Indiana State Bar Association. All rights reserved.

Reproduction by any method in whole or in part without permission is prohibited.

OFFICERS
President:
Amy Noe Dudas, Richmond
President Elect:
Hon. Tom Felts, Fort Wayne
Vice President:
Michael Jasaitis, Crown Point
Secretary:
Scott Wylie, Evansville
Treasurer:
Tonya Bond, Indianapolis
Counsel to the President:
Jim Williams, Muncie

BOARD OF GOVERNORS
1st District:
Candace Williams, Gary
2nd District:
Barbra Stooksbury, Chesterton
3rd District:
Joe Fullenkamp, South Bend
4th District:
Lindsay Lepley, Fort Wayne
5th District:
Cliff Robinson, Rensselaer
6th District:
Julia Kozicki, Noblesville
7th District:
Anne McFadden, Bloomington
8th District:
Raymond Dudlo, Evansville
9th District:
Derrick Wilson, New Albany
10th District:
Melissa Cunnyngham, Frankfort
11th District:
Colin Flora, Indianapolis
11th District:
Ann Sutton, Indianapolis
11th District:
Jimmie McMillian, Indianapolis
At Large District:
Renee Ortega, Hammond
At Large District:
Mike Witte, Nineveh
Past President:
Clayton C. Miller, Indianapolis
House of Delegates Chair:
Angka Hinshaw, Indianapolis
House of Delegates Chair Elect:
Séamus Boyce, Indianapolis
Young Lawyers Section Chair:
Brandon Tate, Indianapolis
Young Lawyers Section Observer:
Adrienne Rines-Hammond, Marion



7 PRESIDENT'S PERSPECTIVE

10 ISBA UPDATE

35 CRIMINAL JUSTICE NOTES

39 ETHICS

43 CIVIL LAW UPDATES

46 MARKETPLACE

CONTENTS

Contributors



Amy Noe Dudas
Attorney
Dudas Law
amy@dudaslaw.com



Hon. Gary L. Miller
Judge
Marion Superior Court
gary.miller@indy.gov



Adrienne Meiring
Executive Director
Office of Judicial and Attorney Regulation
Adrienne.Meiring@courts.in.gov



Taylor Ray Cook
IRFC Youth Project Coordinator
Child Advocates, Inc.
taylor@childadvocates.net



Cari Sheehan
Assistant Clinical Professor of Business Ethics and Law
IU Kelley School of Business
clsheeha@iu.edu



Dakota C. Slaughter
Associate
Bose McKinney & Evans LLP
dslaughter@boselaw.com



Raymond P. Dudlo
Attorney
Stoll Keenon Ogden PLLC
raymond.dudlo@skofirm.com



Donna J. Bays
Attorney
Bays Family Law
dbays@baysfamilylaw.com



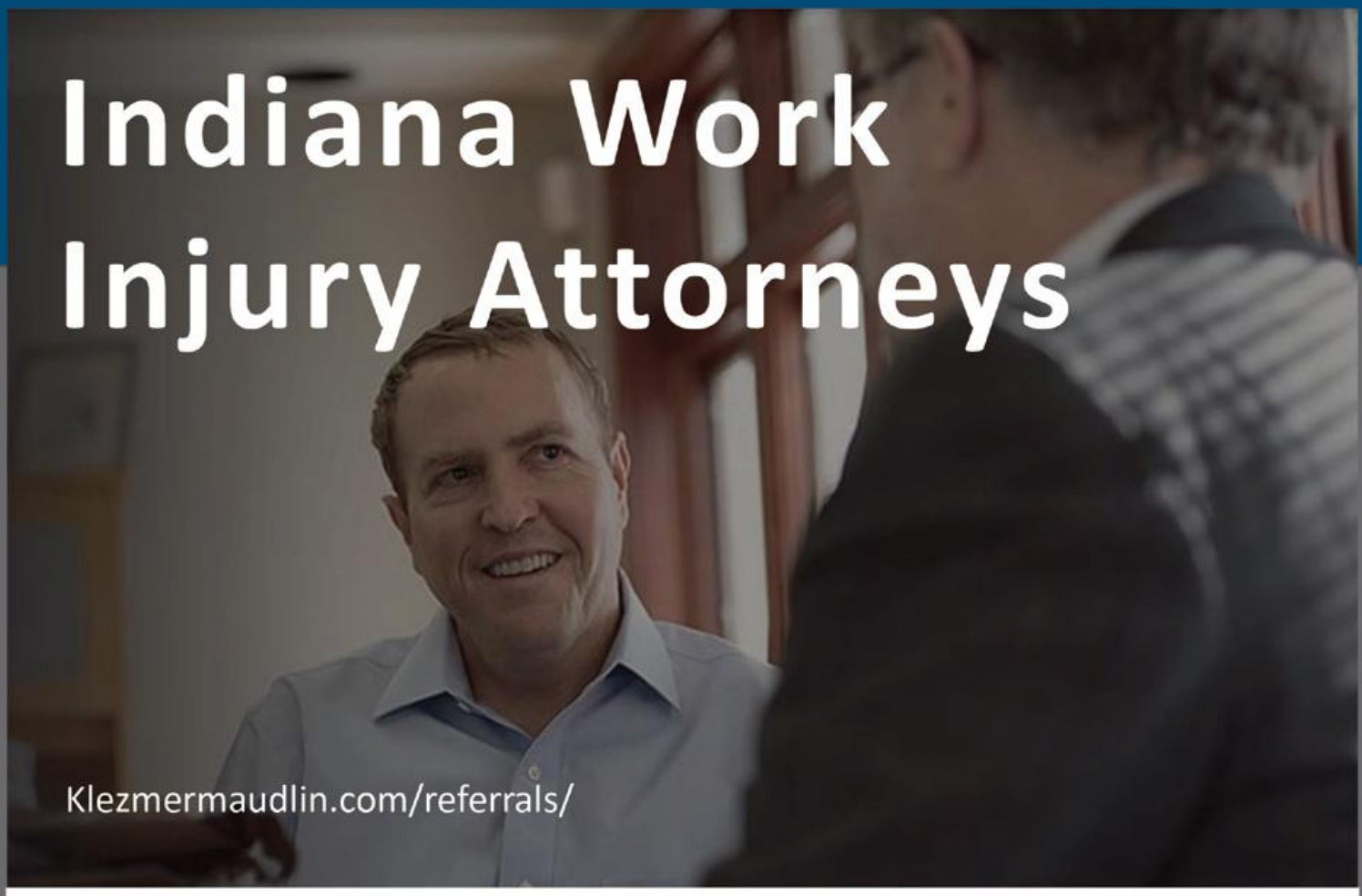
Farrah Goodall
Summer Associate
Bose McKinney & Evans LLP
fgoodall@boselaw.com



Rhea M. Jones-Price
Attorney
Jones-Price Law
rjonesprice@gmail.com



Joel M. Schumm
Clinical Professor of Law
IUPUI
jmschumm@iupui.edu



KLEZMER MAUDLIN PC

JEFFERSONVILLE 812.425.3180
INDIANAPOLIS 317.569.9644
EVANSVILLE 812.425.3180
TOLL FREE 800.809.3776
KLEZMERMAUDLIN.COM

President's Perspective

I'M SORRY, DAVE. I'M AFRAID I CAN'T DO THAT.

By Amy Noe Dudas

PRESIDENT'S PERSPECTIVE

As promised, I've spent a lot of time since October digging deep into the question of not what is it lawyers do but *who we are* that makes us uniquely qualified to practice law.

The LSAT is designed to ensure law school admittees have baseline skills in reading comprehension, reasoning, and writing. Law school directly targets research skills, critical thinking, ethics, issue spotting, and an understanding of the basic foundation of the American legal system.



But most of you agree there are a variety of *qualities* that are common among really good lawyers that aren't so directly tested or taught pre-admission or in law school.

Good lawyers demonstrate a high level of emotional intelligence. They're able to manage their emotions and can read and even positively affect those of other people. They're satisfied with the win, and they take the loss without pouting or stomping. They take nasty colleagues in stride and calmly assure an unruly client that their behavior won't land well when it matters.

Good lawyers are genuinely curious. They love learning new things, which makes them good at digging deep into a case without needing to be told to do so. People fascinate them, and they're interested in how things work.

Humility is another important and common trait among great lawyers. How easy would it be to walk around all puffed up, knowing the product you're "selling" is basically your own brainpower? Good lawyers are self-aware, recognizing the power they could wield, the advantage they could take, but they aren't even tempted. Rather, the goal is equity and justice, even if that means the client doesn't get everything they want.

There is nothing more powerful than effective communication. To be frank, by the time we get to law school, we should already be skilled writers. (Law school is actually where all the creativity and nuance is drained out of your superior writing skills.) We should have learned decent writing techniques in high school and honed them while completing our undergraduate studies. But law school cultivates our persuasive writing skills, organizational abilities, and then gives us opportunities to become effective orators and debaters. This is not what I mean when I speak about communication skills.

I'm talking about the ability to communicate at different levels. Really good lawyers can help someone without much education understand why the complex hearsay rules won't allow them to say certain things on the witness stand, and they can also explain highly technical contract small print to

sophisticated business executives. They can tactfully redirect a client whose goals are unrealistic. Their emotional intelligence means they can *read people*; they sense how best to communicate with any particular individual and can effectively translate information into that person's language.

Good lawyers can put nearly anyone at ease. For me, I feel like I'm successful when a client gets up to leave my office saying, "I feel so much better now."

Most of you agree with me that these shared qualities aren't taught in law school. It was a group of bright IU Maurer law students who pushed back a bit. They mused that while law school doesn't obviously teach these qualities, having them or not having them is one indicator of ultimate success. To continue to make your way through law school without losing your mind, you develop these qualities out of necessity. (But you already had to inherently understand them.)

After all, a lack of emotional intelligence makes you unlikely to survive that brutal Socratic interrogation in Contracts. Show off your so-called "brainpower" in Torts and you're likely to get shown up in a way you'll never forget. And you'd better learn quickly to persuasively argue your perspective on that final exam based on everything you've learned about what Professor CivPro finds important, or you'll not make it past 1L.

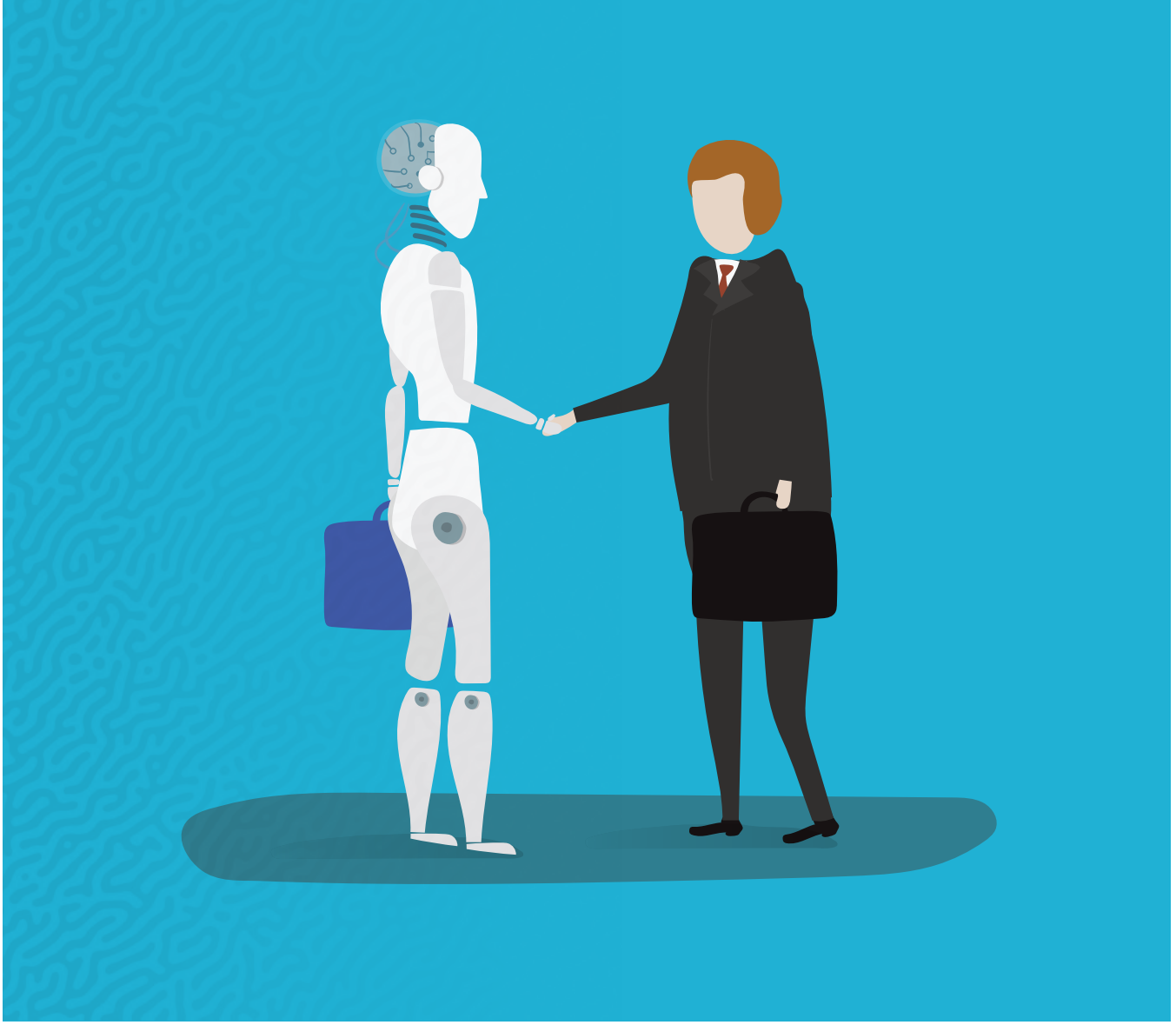
"Good lawyers are self-aware, recognizing the power they could wield, the advantage they could take, but they aren't even tempted."

Fostering these qualities really is part of the law school experience, then, because if you don't have them, you're unlikely to finish. And even if you manage to graduate and pass the bar without an understanding that these qualities are crucial to great lawyering, you'll not likely find yourself regarded as a well-respected member of the bar.

Here's where I'm going with this (*finally*, you say): **artificial intelligence is not going to replace lawyers**.

Good lawyers, being flexible and eager to learn new things, will embrace AI as a *tool* to help them be more *efficient*. Good lawyers will pay attention to how other industries are using AI, research the pros and cons of ongoing development, and advise legislatures and policy makers about best practices for leveraging this technology without allowing it to turn into HAL (if you don't know what I'm talking about—which means you're still puzzled over the title of this piece—put this down *right now* and go watch "2001: A Space Odyssey"). We also will find a way to use AI to give more people more access to more legal resources,





"Here's where I'm going with this (finally, you say): artificial intelligence is not going to replace lawyers."

especially those who have been left out of the American justice system for far too long.

Dear ChatGPT: Write 100 words explaining why AI won't replace lawyers.

> AI is undoubtedly transforming various industries, but it is unlikely to replace lawyers entirely. While AI can assist in tasks such as legal research, document analysis, and contract review, it lacks the nuanced understanding of complex legal concepts, ethics, and human judgment that lawyers possess. Legal matters often involve intricate interpretations of laws, negotiation skills, and strategic decision-making, which require human expertise. Additionally, the legal profession demands empathy, client counseling, and the ability to navigate the emotional and personal aspects of legal cases, which AI currently cannot replicate. Ultimately, AI can enhance legal processes, but the multifaceted nature of law necessitates the continued presence of human lawyers.

Now turn that into a haiku:

> AI aids the law,
> Nuances only humans,
> Lawyers still prevail.

See? We've got nothing to fear. After all, HAL said so.

ISBA UPDATE

By Res Gestae Editor



A DAY IN THE LIFE OF AN LDA GRAD

On May 19, 2023, 25 leaders graduated from the ISBA Leadership Development Academy (LDA). Here's a look into their final session.

THURSDAY, MAY 18, 2023

4:00 p.m.: You fight your way through traffic and construction and arrive at The Bradley in downtown Fort Wayne. You catch a glimpse of your fellow classmates (also slightly frantic, overloaded with bags, and in a mad dash to get in and change clothes) as you check in.

5:00 p.m.: You grab a seat in the Allen & Wells Room, say hello to everyone you haven't seen yet, and settle down for updates. Someone is now in charge of their firm's summer interns. Another has been recognized as an Up and Coming Lawyer. A third successfully completed the Indy Mini Marathon.

5:45 p.m.: You head to the roof for drinks and appetizers. You see Justice Slaughter—who will be speaking tomorrow—and a few other Allen County attorneys.

8:00 p.m.: You grab New-York-style pizzas from a local joint and hole up with the rest of your class to hash out last-minute details for your class project.

FRIDAY, MAY 19, 2023

8:00 a.m.: You wonder how you used to be so adept at pulling late nights and waking up bright-eyed and bushy-tailed the next morning. You chalk it up to youthful optimism and wander down to breakfast where there's already a line for coffee.

8:45 a.m.: "Our deeds count more than our words," Justice Slaughter tells you, as you put away your breakfast dishes and settle in. He discusses the roles lawyers play and the importance of following the 5 Cs: commitment, competence, character, community, and courtesy. You also learn he's a huge baseball fan (who, albeit a baseball purist, does appreciate the recent changes to the game).

9:45 a.m.: You're greeted by LDA alumni who discuss the importance of getting involved and staying involved. "It's not enough to go in, punch the clock, and go home. You have a community to serve," Randy Fisher tells you. "80% of your life is just showing up."

10:45 a.m.: You meet local community leaders—from the mayor to a diversity partner at Barnes & Thornburg. They share their leadership ideals and describe the situations where they've put those ideals to the test. You watch as the mayor declares May 19 "ISBA LDA Day" in the city of Fort Wayne.

12:00 p.m.: You break for lunch and are joined by Judges May, Mathias, and Tavitas.

1:00 p.m.: You brave the warm (and windy) walk to the Allen County Courthouse. Before you can step in to explore the national historic landmark, you're lined up to take a group photo. (You tame your hair as best you can.)

1:30 p.m.: You file into a courtroom, ready to hear an oral argument. Afterwards, you listen as Judge Mathias describes the history of the courthouse and his time serving in its chambers.

3:00 p.m.: You head back to The Bradley for your final session of the day. Tiffany Lemons lays out a series of photographs—lions posing before the sunset, dark tunnels pierced by a beam of light—and asks you to pick one that represents your leadership style. You reflect on how that's changed since your first session.

5:30 p.m.: You change into graduation attire and join the carpool frenzy in the lobby, before heading over to Club Soda.

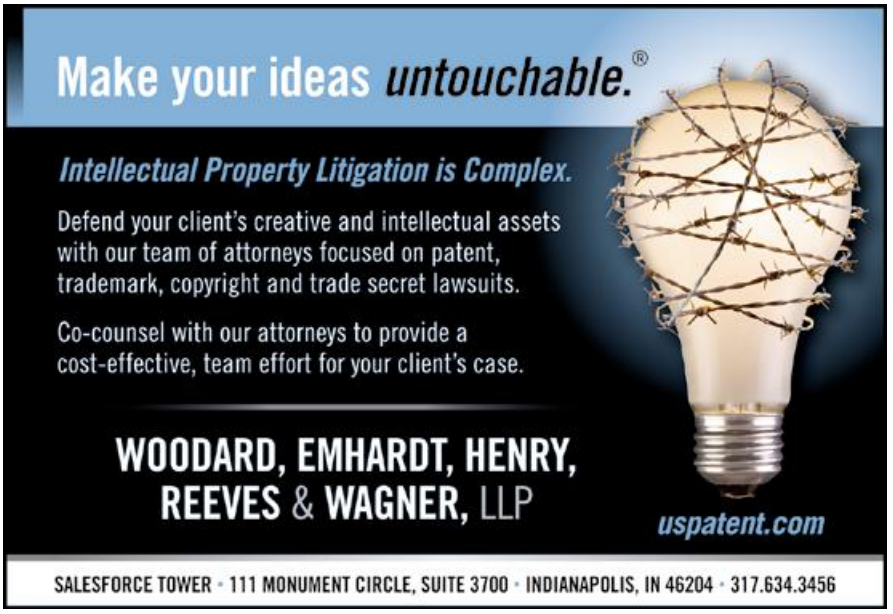
6:00 p.m.: "Muscatatuck. West Lafayette. Purdue. Fort Wayne and Allen County. Who would have thought relationships could be forged around paintball, a nuclear reactor, and that big old bus ride to Harry's from the CJ's house?" former Indiana Supreme Court Justice Steven David tells you, as you wait on dinner. "You now have memories and experiences unique to you and unique to your class, but you are forever bonded with every other class. You are family. Reach out. Use us. Understand, realize, accept that at any point in time, you might be by yourself, but you are never alone."

7:00 p.m.: Your name is read. You collect your certificate, your award, and your challenge coin. You graduate from the Leadership Development Academy.

Please join us in congratulating the graduates of Class XI:

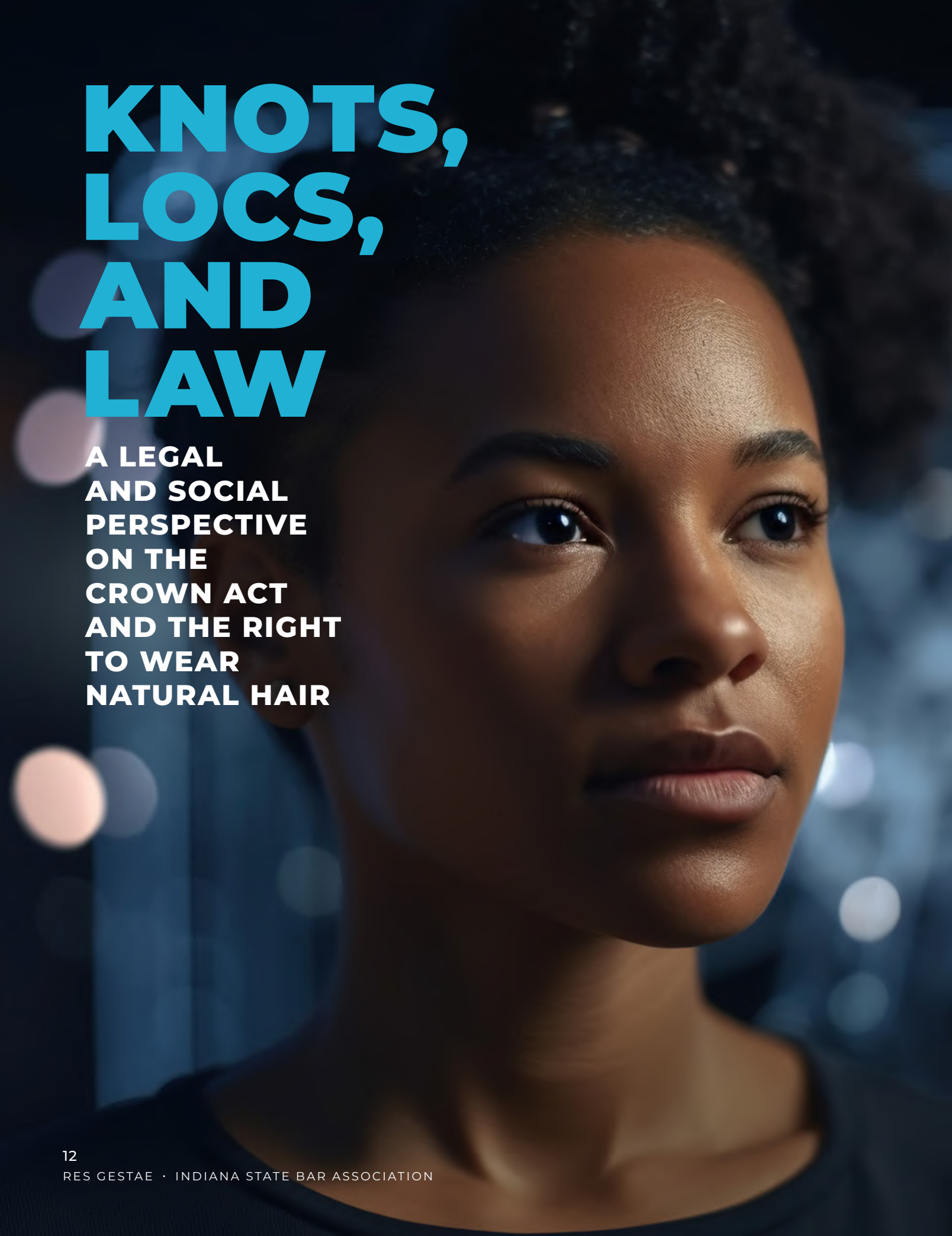
- Waleed Abdalla
- Carita Austin
- Scott Bieniek
- Nick Bognanno
- Nell Collins
- Adam Doerr
- Andrea Ewan
- David Felts
- Katlyn Foust Hunneshagen
- Jaclyn Flint
- Tanner Guthrie
- Lisa Hanna
- Eldin Hasic
- Stephanie Kress
- Lindsay Llewellyn
- Colleen Morrison
- Ashley Roncevic
- Allison Scarlott
- Arqeil Shaw
- Ben Spandau
- Aaron Spolarich
- Spencer Tanner
- Emily VanTyle
- Charles Westerhaus
- Patty Xidias

LDA prepares the next generation of leaders among Indiana's legal profession through five multi-day sessions held across the state. LDA alumni have gone on to lead the ISBA and to serve as judges, corporate leaders, managing partners, and board members. Learn more about the program at www.inbar.org/LDA.



KNOTS, LOCS, AND LAW

A LEGAL AND SOCIAL PERSPECTIVE ON THE CROWN ACT AND THE RIGHT TO WEAR NATURAL HAIR





FEATURE

By Taylor Ray Cook, Raymond P. Dudlo, and Rhea M. Jones-Price

This article was written in conjunction with and on behalf of the ISBA Diversity Committee.

How did you fix your hair this morning?

Did you use a shampoo to increase your hair's volume? Maybe some gel or paste? Ponytail, swept to the side, or perhaps a straight part and a hopeful hiding of your cowlick? Unless there's no hair to style or a hat to hide the bed head, styling one's hair is as routine as brushing your teeth. But have you ever found yourself getting ready in the morning and wondering if your hair—the hair you were born with—would get you fired or denied a job? What about worrying whether your hair would land you in detention or sent to the principal's office? You may be surprised that this is not a novel question. To some, it's a daily task to worry about whether their hair will have damning consequences for their livelihoods.

The decision to wear one's hair in a particular style is highly personal, and reasons behind that choice differ for everyone. Some people may choose to wear their hair in what is termed a "protective style"—a style intended to maintain hair health, as part of a cultural identity, or for a myriad of other personal, financial, medical, religious, or spiritual reasons. Still others decide their hair is merely a means of self-expression.

Put aside the question of whether pink and purple hair is office friendly. This debate is not that. In contemplating the CROWN Act, we only need to ponder a simple idea: Is it justifiable to discriminate against an adult or child for their *natural* hair?

BACKGROUND ON BLACK HAIR

Black hair is an expression of identity and culture. It represents the history of a people and carries deep emotional significance. It has historic connections to Black pride, culture, religion, and history. Ancient African communities fashioned their hair for more than just style. Throughout the continent, hairstyles were features of a person's identity and where they came from. Braids and other intricate hairstyles were historically worn to signify marital status, age, religion, wealth, and rank in society. It could take hours or even

"Data consistently shows that Black women's hair is over twice as likely to be perceived as unprofessional."



days to create these artful looks, so hairstyling was also an important ritual—a time to bond with family and friends. While a range of hair textures are common among people of African descent, natural hair texture that is tightly coiled or tightly curled, along with hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, and Afros are those most closely associated with Black people.

Hair may naturally form into locs, known as freeform locs. Hair may also be manipulated into locs. Whether hair naturally forms or is manipulated into locs, this and other protective or cultural hairstyles often hold great personal significance to the wearer.

HISTORY OF BLACK HAIR AND THE LAW

Black hair has a long history of being policed in America. As far back as 1786, tignon laws were passed to control how Black women wore their hair. During this period, it was customary for women of African descent to adorn their textured hair with gems, exotic beads, and other accents that made them stand out from white women. Esteban Rodriguez Miro, who was the governor of Louisiana at the time, issued a decree that mandated that all Black women wear a tignon (a scarf or handkerchief) over their hair as a visible sign of belonging to the slave class, whether they were free or slave.[1] The intent was to associate the scarves with Blackness and thus to deter plaçage.

Over time, the same sentiments that inspired the tignon laws morphed into a general societal view of Black natural hair as inferior or unprofessional. Such views crept into many modern workplace settings and shaped the parameters

"However, it may surprise some that, until recently, the nation's largest employer, the United States Department of Defense, enforced a general ban on hairstyles such as Afros, twists, cornrows, and plaits."

of dress and grooming policies in workplaces as well as other general employment practices. Some modern workplaces have policies that require Black employees to hide or conceal their hair in a hat or visor, limit Black employees with locs or other protective styles to roles that do not deal with the public,[2] or restrict natural hair or hairstyles due to speculative health or safety concerns.

The impact of a woman's hairstyle may seem minute, but discrimination against Black women's hair has an actual measurable social and economic impact on Black women.[3] The median income for Black women is 16% less than that of white women.[4] Part of this is likely attributable to the disparate impact that workplace grooming policies have on Black women.

Black women are unfairly impacted by societal norms and corporate grooming policies, and often feel pressured to change their hair textures to appear more acceptable for jobs or other opportunities. One in five Black women feel social pressure to straighten their hair for work, which is twice the number of white women.[5] In 2017, 35% of Black women reported spending five or more hours a week on their hair.[6] Data consistently shows that Black women's hair is over twice as likely to be perceived as unprofessional.[7] Thus, this bias impacts how Black women navigate the hiring process. Two out of three Black women change their hair for a job interview.[8] Black women are 54% more likely to feel they must wear their hair straight to a job interview to be successful.[9] Even beyond the hiring process, hair discrimination also leads to negative experiences within the workplace. Black women with coily or textured hair are twice as likely to experience microaggressions in the workplace than Black women with straighter hair.[10] Over 20% of Black women between the ages of 25 to 34 have been sent home from work because of their hair.[11] Companies that fire or refuse to hire or promote Black women because of their protective hairstyles destabilize individuals, households, and the broader economy.

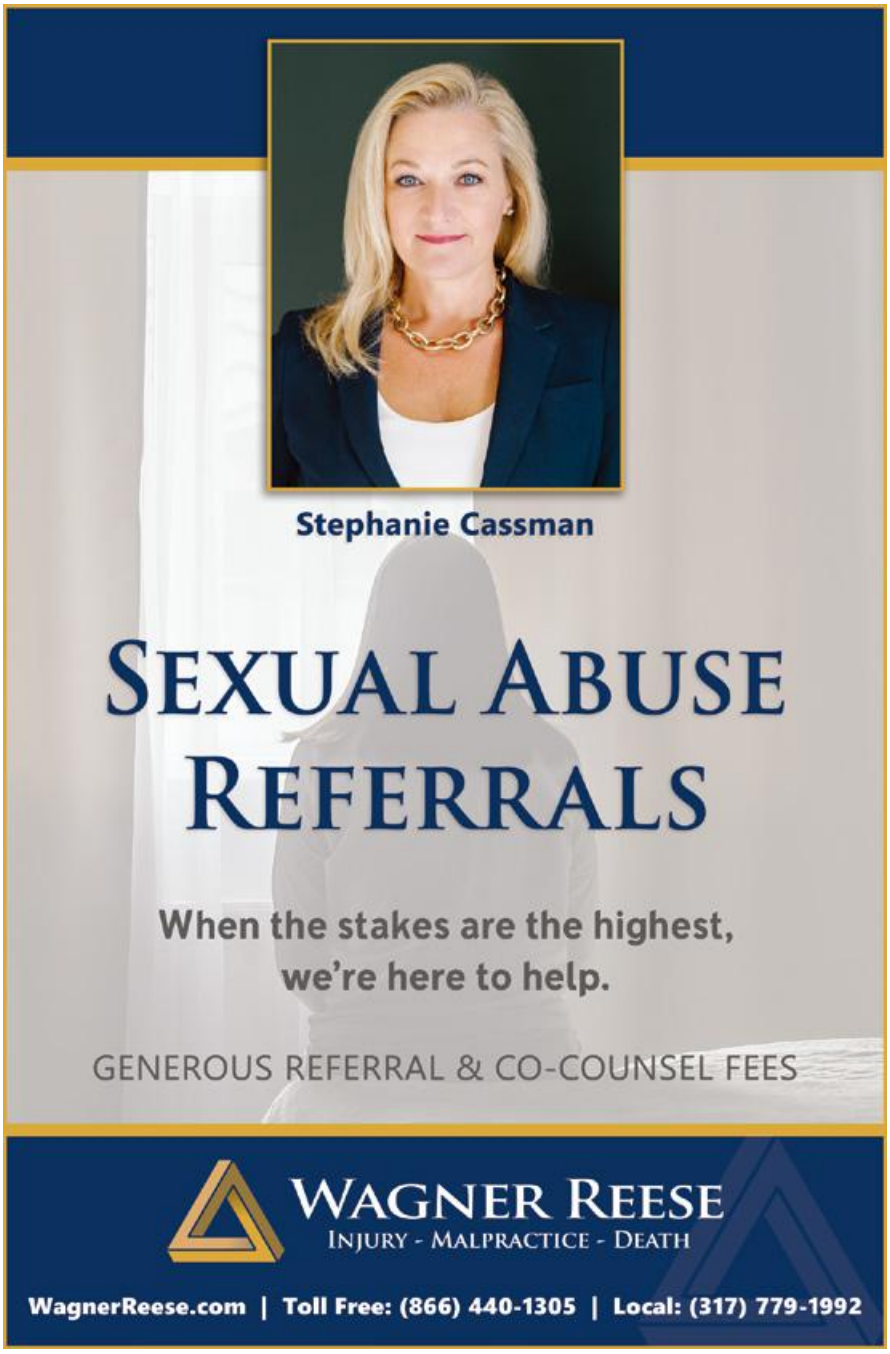
Perhaps the most concerning finding from the CROWN workplace study is the fact that the stigmatizing view of natural hair continues to be a problem, even and especially for young Black professionals. Nearly half of Black women under age 34 feel pressured to have a headshot with straight hair.[12] A quarter of Black women believe they have been denied a job interview because of their hair.[13] That number is even higher (33%) for Black women between the ages of 25 to 34.[14]

In addition to the effects of the issues of the workplace, there are other economic and health considerations to examine when women decide to change their hair. Changing the texture of their hair requires the use of tools and chemicals that are harmful to their bodies and reproductive systems.[15] These processes also are expensive and time-consuming.[16] If Black women do not want to use tools or chemicals, they often resort to the expensive alternative of wearing wigs and woven hairstyles.[17]

Some may query why specified legislation addressing hair discrimination is even necessary. After all, Title VII of the Civil Rights Act of 1964 prohibits employers from discrimination against employees on the basis of race. Further, it really is "just hair," and there are certainly other issues that our legislatures could concern themselves with.[18] However, it may surprise some that, until recently, the nation's largest employer, the United States Department of Defense, enforced a general ban on hairstyles such as Afros, twists, cornrows, and plaits.[19] While Title VII of the Civil Rights Act of 1964 prohibited discrimination based on race, as interpreted, it only provides protection against discrimination against hair *type*,[20] not hairstyles culturally associated with a particular race.[21]

In 2013, the Equal Employment Opportunity Commission filed a racial discrimination lawsuit against an Alabama insurance claims company arguing it wrongfully denied employment to Chastity Jones. Jones, a Black woman, attended a job interview in May

2010.[22] She wore a business suit, and her hair was styled in short locs.[23] Upon completion of the in-person interview she was offered the job.[24] Afterward, the person who extended the employment offer informed Jones the company could not hire her "with [her] dreadlocks."[25] When Jones asked why dreadlocks were inappropriate, the employer responded that "they tend to get messy" and that another male applicant was asked to cut his dreadlocks to accept a job offer.[26] Jones refused to cut her hair, returned the new employee documents she was provided, and left that interview after having been hired, without employment.[27]



The Eleventh Circuit noted that existing precedent rejects the argument that Title VII protects hairstyles culturally associated with race.[28] In *Eatman v. United Parcel Service*, the Southern District Court of New York held that a policy prohibiting hairstyles such as dreadlocks, braids, and cornrows, which were identified as "unconventional," is not racially discriminatory under Title VII.[29] Similarly, in *Carswell v. Peachford Hospital*, the Northern District of Georgia Court held that a policy prohibiting braids did not violate Title VII because braids are not an immutable quality to a particular race.[30] The court held that if a characteristic is not immutable to a particular race, then it does not fall within the protections afforded by Title VII.

The grooming policy at issue, which prohibited Jones' short dreadlocks, was race-neutral and included broad language such as "no excessive hairstyles or unusual colors…"[31] In contrast, policies which prohibit "immutable" features, such as Afros, are discriminatory because Afros are an immutable characteristic of a particular race.[32] Conversely, the EEOC did not allege that dreadlocks are an immutable characteristic of Black persons but instead are a hairstyle historically, physiologically, and culturally associated with their race.[33] As a consequence, the Eleventh Circuit held the employer did not discriminate against Jones by requiring her to cut her dreadlocks, finding that, although dreadlocks, according to the EEOC, are a natural outgrowth of the texture of Black hair, such outgrowth does not make dreadlocks immutable to Black persons.[34]

The Eleventh Circuit, in dicta, acknowledged calls to interpret

Title VII more expansively by finding that it encompasses cultural characteristics associated with race.[35] However, the court opined that inclusion of culture in "race" is complex and not easily accomplished:

> Even if courts prove sympathetic to the "race as culture" argument, and are somehow freed from current precedent, how are they to choose among the competing definitions of "race"? How are they (and employers, for that matter) to know what cultural practices are associated with a particular "race"? And if culture characteristics and practices are included as part of "race," is there a principled way to figure out which ones can be excluded from Title VII's protection?[36]

The Eleventh Circuit concluded by suggesting that this issue was a matter best left to the democratic process.[37]

Enter the Creating a Respectful and Open World for Natural Hair, or CROWN Act.

THE CROWN ACT?

A coalition effort founded in 2019, the CROWN Act aims to prohibit discrimination based on race-based hairstyles in the workplace and public schools. It expands the definition of discrimination based on race to include hair-based discrimination. This includes hair texture, hair type, hair length, and protective hairstyles.[38] The CROWN Act is a blueprint aimed to extend protections under the Civil Rights Act. The CROWN Act, in many respects, is the answer to the Eleventh Circuit's suggestion, as it would specify protections for cultural characteristics of hair rather than immutable characteristics of race. As a result, locked hairstyles, for example, would be treated similarly to an Afro for purposes of Title VII.

The CROWN initiative was co-created by The National Urban League, Dove, Western Center on Law and Poverty, and Color of Change. On July 3, 2019, California became the first state to pass the act.[39] In the four years since, Colorado,[40] Connecticut,[41] Delaware,[42] Illinois,[43] Louisiana,[44] Maine,[45] Maryland,[46] Massachusetts,[47] Minnesota,[48] Nebraska,[49] Nevada,[50] New Jersey,[51] New Mexico,[52] New York,[53] Oregon,[54] Tennessee,[55] Virginia,[56] Washington,[57] and the United States Virgin Islands have all passed similar legislation. Several cities and localities have also passed their version of the CROWN Act.[58]

At the national level, the U.S. House of Representatives passed the CROWN Act in 2021.[59] However, it did not advance in the Senate.

Indiana State Representative Vanessa Summers introduced CROWN Act legislation, known as House Bill 1177, in the Indiana General Assembly on January 6, 2022.[60] The proposition was specific in its intent to eliminate discrimination "based on traits historically associated with race, such as hair texture and protective hairstyles."[61] The proposition goes into detail on what hairstyles need additional protections, such as "braids, locks, and twists, as well as hair that is tightly curled or coiled." The bill was referred to the Committee on Education where it summarily died.

HAIR DISCRIMINATION, DISCIPLINE, AND CHILDREN

You may have seen articles or videos circulating around social media detailing how a student was forced to answer for their hairstyle in school. You may have heard a story from a colleague about how they were treated because of their hair. You may have experienced this discrimination yourself. Regardless of how you've consumed this information, one can see, hear, and feel the pain children go through when forced to defend their culture and identity. In 2018, a high school student from New Jersey was forced to cut his locs if he wanted to compete in his wrestling match.[62] The case spurred a Civil Rights investigation but is unfortunately far from uncommon. A 2021 study looked at discipline rates for Black students as compared to other racial groups, and the reasons behind disciplinary actions conducted by teachers and administrators.[63] The study found that Black youth are disciplined four times more often than students of other races.[64] The study also found the discipline is what is considered "discretionary" 70% of the time.[65] Grooming falls into this discretionary category. This is the gray area in discipline where the CROWN Act may be helpful. In Indiana, 12.5% of students are Black.[66] Discipline outcomes for Black children are disproportionately high: 32.3%

"A coalition effort founded in 2019, the CROWN Act aims to prohibit discrimination based on race-based hairstyles in the workplace and public schools."



Landex Research, Inc.
PROBATE RESEARCH

Missing and Unknown Heirs Located
No Expense to the Estate

Domestic and International Service for:
Courts
Lawyers
Trust Officers
Administrators
Executors

1345 Wiley Road, Suite 121, Schaumburg, Illinois 60173
Telephone: 847-519-3600 Fax: 800-946-6990
Toll-free: 800-844-6778
www.landexresearch.com
info@landexresearch.com

of Black students received out-of-school suspension in the 2021–2022 school year.[67] Policies and practices that are steeped in racialized values of what is acceptable should not be placed on the shoulders of students, yet children are often in the position of having to defend their identities.

THE CROWN ACT AND EDUCATORS: WHY HAIR DISCRIMINATION MAY KEEP SOME TEACHERS OUT OF THE CLASSROOM

The CROWN Act may be a step in a more lucrative direction for Indiana regarding education. Legislation specifically protecting teachers of color may be a necessary incentive to bring in more educators from diverse backgrounds. As of 2022, only 3.5% of Hoosier teachers were Black.[68] While there may be a variety of roadblocks preventing diversity in education, legislation that provides an additional layer of protection may be incentivizing, especially in a field

"Policies and practices that are steeped in racialized values of what is acceptable should not be placed on the shoulders of students, yet children are often in the position of having to defend their identities."

that historically has been rigorous on teacher dress and behavior. Subjective ideals of immorality—ideals that often lead to termination—force teachers to be held to a higher standard than the average community member. Legitimate language can help set a new precedent for what is considered professional—broadening the range from Euro-centric standards for grooming, beauty, and style. Removing this layer of ambiguity in professionalism may allow teachers to focus on what matters most—our children.

THE NUMBERS BEHIND WHY MORE BLACK TEACHERS ARE NEEDED

Why are Black educators an important part of our education system? The data backs the importance of having the influence of a Black teacher for Black youth. According to multiple national studies, there is a statistically significant reason for Black youth to experience even just one Black teacher in their early schooling experience.

Coined "the role model effect," a Johns Hopkins study found that having just one Black educator in primary school had a significant positive impact on test scores, decreased the likelihood of students dropping out of high school, and increased the number of students considering attending college.[69] When Black boys had at least one Black teacher in grades three through five, their likelihood of dropping out decreased by 29%.[70] For Black male youths experiencing poverty consistently throughout elementary school, the impact of having the role model of a Black teacher was even greater—the likelihood of dropping out decreases to 39%. There are measurable benefits to having positive role models in the classroom that connect with a student's background. What might this look like in Indiana? Focusing on elementary grades as the study did, we see that Indiana children have suffered in recent years on standardized tests. The Indiana Reading Evaluation and Determination test, otherwise known as iRead, tests reading capabilities of third-grade students. The test is based on Indiana state standards in teaching and is in place to ensure Hoosier children have foundational reading skills before progressing in elementary and secondary school. The test is structured on a pass/fail basis.[71] In the 2021–2022 school year, 64.1% of Black third-grade Hoosiers passed the examination. This was a 10.1% decrease from the 2020–2021 school year.[72] There are several reasons those scores may have dropped—COVID-19 is probably the first thing that comes to mind. But when the data is disaggregated by race, we continue to see Black youth suffer the worst outcomes. The standardized test administered to students in grades 3–8, iLearn, showed results similar to those of the iRead exam.[73] There are many issues that can be addressed when looking at student performance, and the conversation tends to veer toward what students and families need—resources and time, to name a few. What can schools add to support student growth? Hire teachers of color. The Johns Hopkins studies also found that educators of color have higher expectations of students of color compared to standards enforced by white teachers.[74] High expectations and positive representation in the classroom may be missing ingredients to Indiana's testing woes.

CAN THE CROWN ACT HELP WHITE YOUTH?

As the language of the CROWN Act states, this bill focuses on people of color in working environments—namely Black professionals. This begs the question—how can white Hoosiers benefit from this law coming to Indiana? From a classroom perspective, there's a lot to be gained. Multiple studies have shown that there is a lot for white children to gain when their classmates and educators are from backgrounds different from themselves. A 2003 study led by Columbia Business School Professor Katherine Phillips looked at the impacts of diversity and student performance.[75] She found white students in a diverse group outperformed white students in all-white groups. The reason? Having peers of a different background promotes thinking "more broadly."[76]

WHAT'S NEXT?

The next time you're scrolling on Pinterest looking for inspiration for your next haircut, or perhaps adding the latest hair gadget to your online cart, imagine this: a world where hair only signifies joy, culture, and individuality. Or perhaps, hair signifies nothing at all but something on your head. Conversations continue at the state and national level to create a country where hair can be as significant as the wearer wants it to be—but is never the reason someone is excluded from work or school.

The CROWN Act may be one step of many in the direction of creating more affirming spaces for Hoosiers to live and work in. At the heart of the issue, we must address *why* certain hairstyles, particularly those of Black Americans, have been considered unprofessional.

Addressing the roots of anti-Blackness is a step many are taking, but until we reach a point where anti-racist policies are a standard part of the employee handbook, legislation can be a guiding force for creating spaces where everyone can be a professional *and* exist in their full humanity.

Taylor Ray Cook has been doing racial justice work since 2014. She is currently the Youth Project Coordinator for the Interrupting Racism for Children Program at Child Advocates Inc. She lives in Indianapolis with her husband, dog, and newborn daughter.

Raymond P. Dudlo advises clients on federal and state compliance and regulatory matters, including HIPAA and emerging data privacy laws.

Rhea Jones-Price is an attorney practicing primarily in Knox and Vanderburgh Counties. She focuses her practice on Social Security Disability, criminal defense, and CHINS/Termination of Parental Rights cases.



ENDNOTES

1. "That the Negras Mulatas, y quarteronas can no longer have feathers nor jewelry in their hair. [...instead, they] must wear [their hair] plain (llanos) or wear panuelos, if they are of higher status, as they have been accustomed to."
2. *See*, e.g., *Complaint, Tompkns v. The Gap, Inc.*, No. 17 Civ 09759 (S.D.N.Y. 2017) (Black employee claimed that her white manager refused to assign her shifts because of her hairstyle and allegedly called her box braids style "unkempt," "urban," and not "Banana Republic appropriate.")
3. Christy Zhou Koval & Ashleigh Shelby Rosette, *The Natural Hair Bias in Job Recruitment*, 12 Social Psychological and Personality Science, 741–750 (2021).
4. Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Women had median weekly earnings of $902 in third quarter 2020, compared with $1,104 for men, https://www.bls.gov/opub/ted/2020/women-had-median-weekly-earnings-of-902-in-third-quarter-2020-compared-with-1104-for-men.htm (visited May 1, 2023).
5. Alexis McGill Johnson et al., *Explicit and Implicit Attitudes Toward Black Women's Hair*, (2017).
6. *Id.*
7. *Id.* (finding that "Black women perceive a level of social stigma against textured hair, and this perception is substantiated by white women's devaluation of natural hairstyles").
8. CROWN 2023 Workplace Research Study.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* L. A. Wise et al., *Hair relaxer use and risk of uterine leiomyomata in African-American women*, 175 American Journal of Epidemiology, 432–440 (2012) (finding that hair relaxer use is linked to an increase in the incidence of fibroids in Black women); Che-Jung Chang et al., *Use of straighteners and other hair products and incident uterine cancer*, 114 JNCI: Journal of the National Cancer Institute, 1636–1645 (2022).
16. Tamara Gilkes Borr, *"I spent thousands on chemical straightening": the price of having black hair in a white world*, 1843 Magazine, May 27, 2021, https://www.economist.com/1843/2021/05/27/i-spent-thousands-on-chemical-straightening-the-price-of-having-black-hair-in-a-white-world (last visited 2023).
17. *Id.*
18. Erin Brady, *Rep. Jim Jordan Calls CROWN Act a Distraction from Issues*

People Care About, Newsweek, Mar. 18, 2022, https://www.newsweek.com/rep-jim-jordan-calls-CROWN-act-distraction-issues-people-care-about-1689535 (last visited 2023).
19. Maya Rodan, *U.S. Military Rolls back Restrictions on Black Hairstyles*, Time, Aug. 13, 2014, http://time.com/3107647/military-black-hairstyles (last visited Apr. 26, 2023).
20. *See EEOC v. Catastrophe Mgmt. Solutions*, 852 F.3d 1018, 1030 (11th Cir. 2016).
21. *See Cooper v. Am. Airlines, Inc.* 149 F.3d 1167 (4th Cir. 1998).
22. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d at 1021.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 1021-1022.
27. *Id.* at 1022.
28. *Id.* at 1032.
29. *Eatman v. United Parcel Serv.*, 194 F.Supp.2d 256, 259-67 (S.D.N.Y. 2002).
30. *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at *2 (N.D. Ga. 1981).
31. *Id.* at 1022.
32. *Id.* at 1030 (citing *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.* 538 F.2d 164, 168 (7th Cir. 1976) and *Rogers v. Am. Airlines, Inc.*, 527 F.Supp 229, 232 (S.D.N.Y. 1981)).
33. *Id.* at 1030.
34. *Id.*
35. *EEOC* 852 F.3d at 1033.
36. *Id.* at 1034.
37. *Id.* at 1035.
38. The expansion of prohibited forms of discrimination varies by state. As an example, California's CROWN Act protects braids, locks and twists, while Louisiana expands those protections to Bantu knots, curls, cornrow braids, and others. *See* Cal. Gov't Code § 12926 (West 2023) and La. Stat. Ann. § 23:332 (West 2023).
39. Ca. Cal Gov. Code §12926 (West 2023).
40. Colo. Rec. Stat Ann. §§24-34-301 (5.3), (5.8) (West 2023).
41. Conn. Gen. Stat. Ann. §§ 46a-51(23), (24) and 46a-60 (West 2023).
42. 19 Del. C. §§ 710(18), (20) and 711 (West 2023).
43. 775 ILCS 5/1-103 (West 2023).
44. La. R.S. § 23:332 (1). (West 2023).
45. 5 M.R.S.A. § 4553. (West 2023).
46. Md. Code Ann., State Gov't § 20-101(f), (g) (West 2023).
47. M. G. L. A. 4 § 7. (West 2023).
48. MN Stat §363A.03 (2022) (West 2023).
49. Neb. Rev. St. § 48-1102(19), (20). (West 2023).
50. NRS 613.310(7), (8) and 610.010(7), (8). (West 2023).
51. N.J.S.A. 10:5-5(vv), (ww). (West 2023).
52. NMSA 1978, §28-1-2(U), (V). (West 2023).
53. N.Y. Exec. Law § 292(37), (38). (West 2023).
54. Or. Rev. Stat. § 659A.001(10), (11). (West 2023).
55. TN ST § 50-1-313. (West 2023).
56. Va. Code Ann. § 2.2-3901(D). (West 2023).
57. RCW 49.60.040(21). (West 2023).
58. Tempe, AZ. Ordinance No. 02021.55.(https://www.tempe.gov/home/showpublisheddocument/93017/637721521272270000); Broward Co., FL. Ordinance No. 2020-45. (https://library.municode.com/fl/broward_county/ordinances/code_of_ordinances?nodeId=1054716); Clayton Co., GA. Ordinance No. 2021-32. (https://library.municode.com/ga/clayton_county/codes/code_of_ordinances?nodeId=PTIICOCLCOGE_CH62OFMIPR_ARTIVCLCOCRAC); Covington, KY. Ordinance No. 0-23-20. (https://www.covingtonky.gov/Portals/covingtonky/Government/Codes%20of%20Ordinances/O-23-20%20AMEND%20SECT%2037.02%20HUMAN%20RIGHTS%20(10-27-20).pdf?ver=oj6CcZftBCHAkGjg5nuEXQ%3d%3d); Ann Arbor, MI. Ordinance No. 21-18. (https://library.municode.com/mi/ann_arbor/ordinances/code_of_ordinances?nodeId=1093262); Kansas City, MO. Ordinance No. 200837. (https://library.municode.com/mo/kansas_city/ordinances/code_of_ordinances?nodeId=1042836); Durham, NC. Ordinance No. 15762. (https://library.municode.com/nc/durham/ordinances/code_of_ordinances?nodeId=1066312); Cincinnati, OH. Ordinance No. 351.2019. (https://library.municode.com/oh/cincinnati/codes/code_of_ordinances?nodeId=TITIXMI_CH914UNDIPR_S914-1-TNAHATYNAHASTCOASRA); Philadelphia, PA. Bill No. 200252. (http://files.amlegal.com/pdffiles/Philadelphia/200252.pdf); Austin, TX. Ordinance No. 20220609-043. (https://library.municode.com/tx/austin/ordinances/code_of_ordinances?nodeId=1165542); Charleston, WV. Bill. 7907. (https://library.municode.com/wv/charleston/ordinances/code_of_ordinances?nodeId=1089148); Milwaukee, WI. Ordinance No. 200840. (https://milwaukee.legistar.com/LegislationDetail.aspx?ID=4668600&GUID=638F4CE9-3BB7-4D25-925C-B54FB36E63ED&Options=&Search=&FullText=1).
59. Text - H.R.2116 - 117th Congress (2021-2022): Creating a Respectful and Open World for Natural Hair Act of 2022, H.R.2116, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/2116/text.
60. 2022 Bill Text IN H.B. 1177; https://iga.in.gov/legislative/2022/bills/house/1177.
61. *Id.*
62. Michael Gold and Jeffrey Mays, *Civil Rights Investigation Opened After Black Wrestler Had to Cut His Dreadlocks*, New York Times, Dec. 21, 2018, https://www.nytimes.com/2018/12/21/nyregion/andrew-johnson-wrestler-dreadlocks.html.
63. Howard Henderson, Penalizing Black hair in the name of academic success is undeniably racist, unfounded, and against the law, (Feb. 23, 2021), https://www.brookings.edu/blog/how-we-rise/2021/02/23/penalizing-black-hair-in-the-name-of-academic-success-is-undeniably-racist-unfounded-and-against-the-law/.
64. *Id.*
65. *Id.*
66. Indiana Youth Institute, KIDS COUNT Data Book 194-222 (29th ed. 2023).
67. *Id.*
68. *Id.*
69. Jill Rosen, Black students who have at least one black teacher are more likely to graduate, HUB - Johns Hopkins (Apr. 5, 2017), https://hub.jhu.edu/2017/04/05/black-teachers-improve-student-graduation-college-access/.
70. *Id.*
71. Dr. Katie Jenner, IREAD-3 Performance Level Descriptors (PLDs), Indiana Department of Education https://www.in.gov/doe/files/IREAD-3-Performance-Level-Descriptors-v2.pdf.
72. Indiana Youth Institute, KIDS COUNT Data Book 194-222 (29th ed. 2023).
73. Indiana Department of Education, I-LEARN, Department of Education https://www.in.gov/doe/students/assessment/ilearn/.
74. Rosen, *supra*.
75. Katherine W Phillips and Denise Lewin Loyd, *When Surface and Deep-Level Diversity Collide: The Effects on Dissenting Group Members*, 1 Elsevier (2003).
76. Anya Kamenetz, *The Evidence That White Children Benefit From Integrated Schools*, NPR (Oct. 19, 2015), https://www.npr.org/sections/ed/2015/10/19/446085513/the-evidence-that-white-children-benefit-from-integrated-schools.

WHEN IS AN OATH NOT AN OATH? IT'S TIME TO REVISIT ADMISSION AND DISCIPLINE RULE 22

By Hon. Gary L. Miller



Merriam Webster defines "oath" as "a solemn usually formal calling upon God or a god to witness to the truth of what one says or to witness that one sincerely intends to do what one says."[1] Oaths are administered to prospective jurors prior to *voir dire* and again to them prior to opening statements. Oaths are required to be given to witnesses before they testify, public officials before entering into service, and numerous other situations where society places a high level of credence into a solemn promise.

The American Bar Association published a well-written article by Robert Gottfried that analyzed the "anatomy" of an oath and noted that all oaths that lawyers take require lawyers to practice with "professionalism, integrity, and respect."[2]

Indiana Admission and Discipline Rule (IADR) 22 require lawyers to take the following oath before being admitted to practice law in the state of Indiana:

> I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself;

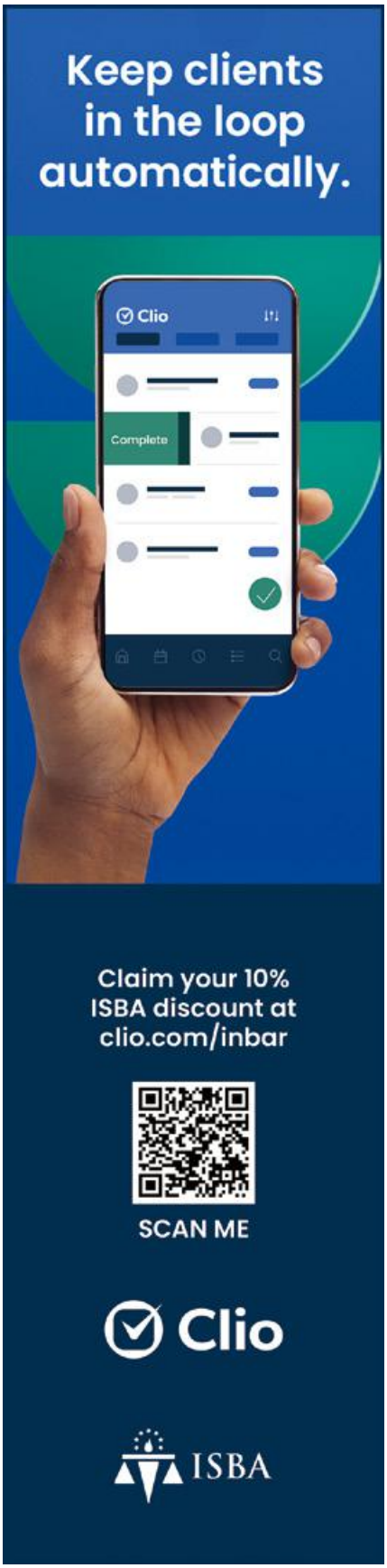
"It is clear from the language of IADR 22 that not only is the language contained in Indiana's oath archaic, but there are several instances where IADR 22 conflicts, or is inconsistent, with the language of the Indiana Rules of Professional Conduct."

> I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed, or those who cannot afford adequate legal assistance; so help me God.[3]

It is clear from the language of IADR 22 that not only is the language contained in Indiana's oath archaic, but there are several instances where IADR 22 conflicts, or is inconsistent, with the language of the Indiana Rules of Professional Conduct (IRPC).

For example, the oath's phrase "I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust…" places an impossible burden upon counsel to determine the "justness" of an action, proceeding, or defense before undertaking representation, when the rules simply don't require it. The IRPC emphatically states that a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[4] The commentary goes further in explaining that "[L]egal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities."[5] To believe otherwise would prevent lawyers from representing clients unless the client passed a "justness" test to the individual lawyer's satisfaction. This is certainly not what the rules, or the profession, intend.

Second, the phrase "I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth…" seems to create another obstacle to representing potential clients by burdening the lawyer with the unenviable task of trying to determine "truth." All practicing lawyers know that "truth" is an elusive concept and is impossible to define. Perhaps the original authors of the oath intended to cloak the profession with a layer of righteousness by requiring the profession to seek "truth," but in today's world, placing this responsibility on a lawyer is misplaced and unduly limits representation of clients.



Third, and perhaps most importantly, the phrase "I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself…" clearly conflicts with the obligations a lawyer has under IRPC 1.6.

Although a number of jurisdictions still separately define the terms "confidences and secrets,"[6] and some limit the protections to "confidences" or "confidential information,"[7] most jurisdictions, including Indiana, take the American Bar Association's Model Rule approach and prohibit "information relating to representation of a client."[8] Where a jurisdiction has used the language of "confidences and secrets," they define these terms in their rules much like Alaska in that:

> …"confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client.[9]

Many years ago, Indiana adopted the Model Rule version applying confidentiality protection "information" rather than "confidences" or "secrets" as described by Indiana's oath. By design, the rule is meant to be broad in its scope to benefit the client and protect the client-attorney relationship. There are numerous exceptions to IRPC 1.6(a) as detailed in IRPC 1.6(b) that are simply incompatible with the language of the oath. These exceptions have been developed over the years to circumvent the requirements of the oath in exceptional and unusual circumstances. Lawyers *may* reveal information relating to the representation of the client:

> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (6) to comply with other law or a court order.[10]



"Clearly these are worthy exceptions to IRPC 1.6(a) in appropriate situations. Just as clearly, the exercise of these permissive exemptions violates the oath of attorneys described in IADR 22."



While the IRPC contains these exceptions, there are no such exceptions to the language in the IADR 22 oath. Thus, if a lawyer in Indiana permissively discloses information relating to the representation of the client under IRPC 1.6(b), the lawyer violates the mandate of IADR 22 to "preserve inviolate" information of the client. Those who might argue that the exemptions of IRPC 1.6(b) fall within the discretion of the lawyer fail to recognize the modern perils of the practice of law. If one abides by the oath, a lawyer cannot effectively mount a defense to a legal malpractice claim or a suit over fees. If the lawyer discloses information necessary to defend himself or to pursue fees, then the lawyer violates the oath. If a lawyer follows the oath, the lawyer can never disclose information to protect a third person from a client with diminished capacity who makes credible threats against another, nor could a lawyer maintain the oath and still provide an explanation to a court regarding the reasons for a withdrawal of appearance, or any action in litigation even under the threat of contempt. Clearly these are worthy exceptions to IRPC 1.6(a) in appropriate situations. Just as clearly, the exercise of these permissive exemptions violates the oath of attorneys described in IADR 22.

In an article written for their column in *Res Gestae*,[11] Don Lundberg and Caitlin Schroeder discuss Indiana's oath and a few cases that dealt with the difficult task of applying and enforcing its antiquated language. They acknowledge that "we're inspired by the Oath of Attorneys; it is an important statement of the core values of our profession. But the fact that we might get professionally disciplined for falling short of those values from time to time in the form they are expressed in the oath is a scary thought."[12] They did not, however, go so far as to suggest the oath be changed. Nor did authors James Bell and Stephanie Grass suggest a change in the rule in their *Res Gestae* article "What is Civility and 'Offensive Personality' Anyway?" where they discussed several problematic issues with the oath.[13] This author takes the position that change in the language of IADR 22 is required to comport with the Rules of Professional Conduct. I suggest following the lead of these two examples.

The oath of attorneys in Illinois is a simple one:

> I do solemnly swear (or affirm), that I will support the constitution of the United States and the constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of attorney and counselor at law to the best of my ability.[14]

Missouri lawyers take the following oath:

> I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Missouri; that I will maintain the respect due courts of justice, judicial officers and members of my profession and will at all times conduct myself with dignity becoming of an officer of the Court in which I appear; that I will never seek to mislead the judge or jury by any artifice

"It is well past the time to change Indiana's ADR 22 so that when lawyers raise their right hand to take their oath, they do not have their left hand behind their back with fingers crossed."

or false statement of fact or law; that I will at all times conduct myself in accordance with the Rules of Professional Conduct; and, that I will practice law to the best of my knowledge and ability and with consideration for the defenseless and oppressed. So help me God.[15]

Both of these jurisdictions have given up the archaic, confusing language used in Indiana's oath for a more practical, realistic, and modernized oath that clearly and concisely sets out the aspirational standards and minimal requirements of conduct for lawyers in their respective states.

How then does a lawyer in Indiana balance the obvious differences and conflicts in the requirements of the oath and the obligations under the IRPC? At this time, it appears it is up to the discretion of the Disciplinary Commission and the separate discretion of the Indiana Supreme Court to choose to prosecute and enforce the oath or the IRPC. We can do better than that. It is well past the time to change Indiana's ADR 22 so that when lawyers raise their right hand to take their oath, they do not have their left hand behind their back with fingers crossed.

Probate Litigation



Curtis E. Shirley

- Will & Trust Contests
- Interference with Inheritances
- Guardianship Disputes
- Co-counsel and Expert Testimony in all Indiana counties

Telephone: 317.439.5648

1905 S. New Market St., Suite 200, Carmel, IN 46032

Email: curtis@shirleylaw.net | URL: www.shirleylaw.net

ENDNOTES

1. Merriam-Webster.com Dictionary, *Oath*, Merriam-Webster, https://www.merriam-webster.com/dictionary/oath.
2. Robert Anthony Gottfried, *The Anatomy of Our Oath*, American Bar Association, https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/professional-life/anatomy-of-our-oath/.
3. Ind. Rules of Court, Rules for Admission to the Bar and the Discipline of Attorneys, Rule 22 (hereinafter "IADR 22").
4. Ind. Rules of Prof. Conduct 1.2(b).
5. Ind. Rules of Prof. Conduct 1.2, commentary 5.
6. Alaska Rules of Prof. Conduct 1.6(a), District of Columbia Rules of Prof. Conduct 1.6(b), Maine Rules of Prof. Conduct 1.6(a), and Michigan Rules of Prof. Conduct 1.6(a).
7. Hawaii Rules of Prof. Conduct 1.6(a), Massachusetts Rules of Prof. Conduct 1.6(b), New York Rules of Prof. Conduct 1.6(a), Texas Rules of Prof. Conduct 1.05(a), and Wyoming Rules of Prof. Conduct 1.6(a).
8. Ind. Rules of Prof. Conduct 1.6(a).
9. Alaska RPC 1.6(a).
10. Ind. Rules of Prof. Conduct Rule 1.6(b).
11. Donald Lundberg and Caitlin Schroeder, *'I Swear or Affirm': What's in an Oath?*, 59 Res Gestae 22 (January/February 2016).
12. *Id.*
13. James Bell and Stephanie Grass, *What is Civility and "Offensive Personality" Anyway?* 64 Res Gestae 23 (June 2021).
14. 705 ILCS 205/4.
15. Missouri Supreme Court Rule 8.15.

WHAT DOES YOUR INJURY CO-COUNSEL DO FOR YOU?

- ☑ Come to your office to visit with you and your client
- ☑ Advance litigation costs going forward
- ☑ Prepare the case for settlement and trial
- ☑ Have fair and equitable co-counsel arrangements
- ☑ Maintain a commitment to you and your clients



John McLaughlin, Tony Patterson and Paul Kruse

We know we're not the only law firm that has personal injury attorneys listed in The Best Lawyers in America, ITLA Trial Lawyer of the Year, president of American College of Trial Lawyers, and Indiana SuperLawyers. All accolades aside, we know that all you care about is what you actually receive from your co-counsel. That's why when we say we go the extra mile for your case, we actually mean it. We'll come to your office and meet with you and your client. We'll involve you in strategy and tactics. It's what we do for you—and how we do it— that sets us apart. Give us a call today. And get what you want from your co-counsel.

PARR RICHEY
FRANDSEN PATTERSON KRUSE
INJURY ATTORNEYS

INDIANAPOLIS, IN | LEBANON, IN | 317.269.2509 | WWW.PARRINJURY.COM

SOCIAL MEDIA AND 'FRIENDING' JUDGES, JURORS, AND OTHER PARTIES

By Cari Sheehan



A person's popularity on social media is judged by how many 'friends' or 'connections' they have. The more people that a person connects with online, the more popular the person becomes. However, there are limitations on who an attorney can connect with online. Particularly, attorneys must be very cautious regarding four main categories of people: (1) the judiciary, (2) jurors, (3) represented parties, and (4) unrepresented third persons and/or parties. Many attorneys struggle with trying to figure out what they can do online when it comes to these categories of people. For instance, is it OK to be friends or connect with a judge, and to what extent? Is it OK to investigate potential jurors, and to what extent? Is it OK to communicate with other parties (represented and unrepresented), and to what extent? A good rule for attorneys to remember is that if an attorney cannot do it in person, they cannot do it online. Remembering this rule will hopefully clarify any confusion for attorneys as they navigate through these issues.

THE JUDICIARY

It is inevitable that attorneys and judges all meet, network, and become personal friends. A judge also may be a relative of a lawyer. Real-world professional and personal relationships are subject to ethical constraints. Online interactions between attorneys and judges through social media platforms (e.g., becoming Facebook friends or LinkedIn connections) are also subject to ethical constraints.

Different jurisdictions have adopted different standards for judges and attorneys to follow regarding being friends or connections online.[1] The majority view, which Indiana follows, is provided in ABA

"It is always best to err on the side of caution and, if in doubt, do not friend."

Formal Opinion 462, where judges may participate in online social networking but in doing so must comply with the Code of Judicial Conduct and consider their ethical obligations on a case-by-case (and connection-by-connection) basis.[2] The purpose of any connection between a judge and an attorney should never be to influence the judge in carrying out his or her official duties.[3] The minority of jurisdictions, in contrast, have maintained a stricter standard forbidding judges to friend or connect with attorneys on social media.[4]

It also is important to remember the judiciary includes the judge's staff. An attorney should not try to friend or connect with a bailiff, law clerk, or member of the support staff of a judge without some independent outside connection aside from appearing in the courtroom.

An example of an improper connection would be if an attorney sends a friend request to a judge's bailiff because they met the bailiff while representing a client in the judge's courtroom. This could be deemed an *ex parte* communication. This would be the same if the attorney had sent a friend request to the judge or another member of the judge's staff.

An example of an OK connection would be if you friend a judge online because you are personal friends with the judge outside of you appearing in their courtroom, and the friendship is established and not just an acquaintance type of relationship (e.g., members of same small cat club, college or law school close friends, neighbors, etc.).

Unfortunately, there is no bright-line rule on whether a connection is proper or improper. Each connection is viewed on a case-by-case basis depending on the underlying relationships of those involved. It is always best to err on the side of caution and, if in doubt, do not friend. It is not worth drawing a complaint or violation for an *ex parte* communication which ultimately could affect the client.

JURORS

An attorney may review a juror's public social media presence but may not attempt to access the private portions of a juror's page.[5] Requesting access to the private portions of a juror's social networking website would constitute an *ex parte* communication, which is expressly prohibited by RPC 3.5(a) and (b).[6] As such, an attorney, or an attorney's agent,[7] may not request access to the private portions of a juror's social networking site either.[8]

Most jurisdictions, including Indiana, hold there is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed.[9] This would include social media platforms such as LinkedIn or others that provide viewing notifications to its members with certain levels or membership. Judges also may impose restrictions, by court order, on an attorney's ability to search jurors' social media pages.

It is prudent to remember that an attorney cannot direct someone else, in the law firm or outside of the law firm, to friend or connect with a juror on the attorney's behalf.[10] If the attorney cannot do it, then no one else can do it at the attorney's direction either. This rule is sometimes forgotten regarding social media because of a false sense of anonymity and an attorney's curiosity gets the better of them.

REPRESENTED PARTIES

Under RPC 4.2, a lawyer is forbidden from communicating with a person whom the lawyer knows to be represented by counsel without first obtaining consent from the represented person's lawyer.[11] Under RPC 8.4(a), this prohibition extends to any agents (secretaries, paralegals, private investigators, etc.) who may act on the lawyer's behalf.[12] The bright-line restrictions effectively prohibit lawyers and their agents from engaging in social media communications with persons whom the lawyer knows to be represented by counsel.

For example, an attorney, or his or her agent, may not send Facebook friend requests or LinkedIn invitations to the opposing parties known to be represented by counsel to gain access to those parties' private social media content.[13]

On the other hand, viewing publicly accessible social media content that does not precipitate communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game.

UNREPRESENTED PARTIES/ THIRD PARTY WITNESSES

RPC 4.3 provides that an attorney "shall not state or imply that the lawyer is disinterested when the lawyer knows or reasonably should

know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."[14] In addition, the lawyer "shall not give legal advice to an unrepresented person, other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."[15] This rule, and others contained in the RPC, are designed to protect third parties against abusive lawyer conduct.[16]

RPC 4.3 also pertains to social media and requires attorneys to be cautious in online interactions with unrepresented third parties. Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a matter. This arises more often in the litigation context than in other areas of law.

As with represented parties, publicly viewable social media content is generally OK. If, however, the information sought is protected and hidden behind the third party's privacy settings, ethical constraints may limit the attorney's options for obtaining it. Generally, this type of information cannot be obtained without some legal justification (e.g., subpoena, etc.).

Several jurisdictions have addressed this issue and the consensus appears to be that a lawyer may not attempt to gain access to non-public social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias.[17]

For example, in 2013 an assistant prosecutor in Cayahoga County, Ohio, created a fake profile on Facebook to communicate with defense witnesses to shake their alibi testimony in a murder case.[18] The misguided tactic caused the prosecutor's office to withdraw the case and the assistant prosecutor was fired and received a one-year suspension from the practice of law.[19]

In another example, a prosecutor in Centre County, Pennsylvania, created a fake Facebook profile under the name Brittany Bella to friend witnesses and defendants.[20] The prosecutor sent an email to the other assistant district attorneys in the office, as well as secretarial staff, stating that she had made a fake Facebook page to spy on the witnesses and defendants.[21] She advised everyone to use it freely and to edit it to keep it looking legit.[22] The prosecutor lost her bid for re-election.[23]

CONCLUSION

Attorneys should not allow their curiosity to get them into ethical trouble. Attorneys need to remember that they are not anonymous online and that the RPC apply. There is no "pause" on the RPC just because conduct is online



"Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a matter."

and not in person. The RPC apply 24 hours a day 7 days a week, in person and online, and in an attorney's professional and personal capacity. Attorneys should always remember that if they cannot do it in person, they cannot do it online.

Cari Sheehan is an assistant clinical professor of business law and ethics at the IU Kelley School of Business—Indianapolis where she currently teaches commercial law and business ethics. Additionally, Sheehan is an adjunct professor at the IU Robert H. McKinney School of Law where she has taught courses in appellate practice and procedure and torts. In practice, Sheehan is a part-time conflict attorney at Scopelitis Garvin Light Hanson & Feary advising on ethical issues.

ENDNOTES

1. ABA Formal Opinion 462 (Feb. 21, 2013); Connecticut Opinion 2013-06; Kentucky Opinion JE-119; Maryland Opinion 2012-17; New York Opinion 13-39, 08-176; Ohio Opinion 210-7; South Caroline Opinion 17-2009; and Tennessee Opinion 12-01.
2. ABA Formal Opinion 462 (Feb. 21, 2013); Ind. Judicial Canon 2.9 (2022).
3. Ind. Rule Prof. Conduct 3.5 (2023).
4. California Opinion 66; Massachusetts Opinion 2011-6; Florida Opinion 2009-20; Florida Opinion 2012-12; Florida Opinion 2013-14; Oklahoma Opinion 2011-3; and *Domville v. State*, 103 So.3d 184 (Fla. 4th DCA 2012) (holding that a trial judge must recuse himself from presiding over a criminal case because the judge was Facebook friends with the prosecutor).
5. Ind. Rule Prof. Conduct 3.5 (2023); ABA Formal Opinion 466 (April 24, 2014).
6. Ind. Rule Prof. Conduct 3.5(a), (b) (2023); ABA Formal Opinion 466 (April 24, 2014).
7. Ind. Rule Prof. Conduct 8.4(a) (2023); Ind. Rule Prof. Conduct 5.1(c) (2023).
8. ABA Formal Opinion 466 (April 24, 2014).; Ind. Rule Prof. Conduct 8.4(a) (2023); Ind. Rule Prof. Conduct 5.1(c) (2023).
9. ABA Formal Opinion 466 (April 24, 2014).; *in contrast* see NYC Opinion 2012-2 (opining that if a juror can learn that an attorney is viewing their profile online, even if public, then it is an *ex parte* communication).
10. Ind. Rule Prof. Conduct 8.4(a) (2023); Ind. Rule Prof. Conduct 5.1(c) (2023).
11. Ind. Rule Prof. Conduct 4.2 (2023).
12. Ind. Rule Prof. Conduct 8.4(a) (2023) (providing that an attorney may not knowingly assist or induce another to violate the Rules of Professional Conduct or do so through the acts of another); Ind. Rule Prof. Conduct 5.1(c) (2023).
13. In the corporate context, high-ranking employees of a corporation should be treated as represented parties and, therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content. *See generally* Ind. Rule Prof. Conduct 1.13, comment 1 (2023).
14. Ind. Rule Prof. Conduct 4.3 (2023).
15. *Id.*
16. Ind. Rule Prof. Conduct 3.4 (2023) (regarding Fairness to Opposing Party and Counsel); Ind. Rule Prof. Conduct 4.1 (2023)(regarding Truthfulness in Statements to Others); Ind. Rule Prof. Conduct 4.4 (2023)(regarding Respect for Rights of Third Persons); Ind. Rule Prof. Conduct 8.4 (2023) (regarding Misconduct); *In re Gamble*, 338 P.3d 576 (Kan. 2014)(holding that an attorney violated the RPC when he was representing an adoptive father in an adoption proceeding and sent the unrepresented biological mother a private Facebook message warning her in colorful terms of the consequences of putting her child up for adoption).
17. Oregon Opinion 2013-189; Kentucky Opinion KBA E-434; New York State Opinion 843; New York City Opinion 2010-2; and Pennsylvania Opinion 2014-300. All concluding that lawyers are not permitted, either themselves or through agents, to engage in false or deceptive tactics to circumvent social media users' privacy settings to reach non-public information.
18. Jack Karp, 5 Mistakes Millennial Attys Should Avoid On Social Media (March 20, 2018) at www.law360.com.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

Jackson Kelly PLLC seeks to add an associate with litigation experience to our team in Evansville, IN.

Information about the firm is available at www.jacksonkelly.com.
Resumes should be sent to Angela Freel, alfreel@jacksonkelly.com.

221 NW Fifth Street, Evansville, IN 47708
513-683-9000
www.JacksonKelly.com

MEMBER ANNOUNCEMENT

BECAUSE I'M A RECOVERING BULIMIC...

By Donna J. Bays



You know what happens when you come face-to-face with your deepest shame? I do. I'm feeling it as I type these words into a laptop. My face is flushed. There's a lump in my throat. My chest feels exposed, and I have to breathe deeply to resist the urge to puke.

You see, I just outed myself in a Boone County Court.

I was on the witness stand testifying as a Guardian ad Litem. My client was the child of an alcoholic. I was explaining why mere lip service to the 12 steps of Alcoholics Anonymous doesn't generate the insight needed to avoid relapse. I thought it was going well.

Until a single question on direct exam suddenly made it personal:

Q: You know a lot about the 12 steps. How did you come to acquire that knowledge?

(Pause. Long pause. Panic hits. And grows.)

I've testified about drug, alcohol, and mental health issues many times. But I never had to publicly reveal the truth about my own challenges. Until this day. On this day, the lawyer worded her question a little bit differently than anyone previously:

Q: How did *you* come to *acquire* that knowledge?

When testifying, I take my oath seriously. Perjury is a serious crime. I wouldn't lie. But to answer truthfully, I had to expose a truth about myself that very few people knew. I took a deep breath, then revealed what until then had been perhaps the most closely held secret in my private life.

A: Because I'm a recovering bulimic...

I don't remember the exact words for the rest of my answer. I talked about 35 days of in-patient treatment in 2004 where my eating disorders and depression were treated with the 12 steps of AA. We just replaced the word "alcohol" with the word "food" and then everything made sense. I talked about attending 12-step meetings and "working the steps."

At the morning break, the lawyer who asked that question came up and apologized. She knew I consult with successful recovering alcoholics. She thought I was going to talk about relying on attorneys who have more than 10 years of recovery. That's how I usually explain the source of my information. I've never revealed the names of those lawyers publicly but have leaned on them a lot. I told her she had nothing to apologize for.

I've been eating disordered since high school. As a teen, I ate as little as possible, with some days limited to water and raw vegetables. In college, I discovered that I could binge on a whole bag of chips and still make weight if I vomited right afterwards. A little milk made the process pretty painless. I thought I had discovered a new secret and was, frankly, pretty proud of myself.

That was 1977. I'd never heard of bulimia. The term didn't even exist back then. It was first coined by a British psychiatrist to describe an eating disorder in 1979. Never mind what the Romans did at Caesar's banquet tables, "bulimia" didn't make it into the DSM diagnostic manual until 1980.

Fortunately, I've been working with JLAP since 2004. Before I flew to the Arizona hospital, JLAP helped me feel better about accepting treatment. After discharge, they helped me return to the real world. I can't tell you how much that helped—especially in the early days. For the first few years, I went to a JLAP support meeting for emotional disorders.

The JLAP support and encouragement came from lawyer volunteers and from the professional staff. JLAP has long known about my illnesses. They never told a soul without permission. A few times, JLAP asked if they could divulge my story to another attorney facing similar problems. I usually said yes because I knew the revelation would be confidential. Admission and Discipline Rule 31 deals with JLAP. Section 9(a) says:

> All information, including records obtained by the Committee in the performance of its duty under these rules and as delegated by the Supreme Court of Indiana, shall be confidential, except as provided by the Program Guidelines.

In fact, violating that confidentiality would subject the blabber to disciplinary action. Section (9)(c) reads:

> Violation of the confidentiality provisions of this rule shall be subject to disciplinary proceeding under Indiana Admission and Discipline Rules 12, 23 and 26.

"I took a deep breath, then revealed what until then had been perhaps the most closely held secret in my private life."

In the past, an experience like that testimony would have eaten me alive (no pun intended), locking my brain into an obsession along the lines of "What the hell have I just done?" Thanks to the help I've received from therapy, 12-step meetings, and JLAP, I knew that the only way to successfully process that feeling was talking to somebody who would understand.

I phoned a JLAP volunteer. It was late on a Friday afternoon. The JLAP volunteer was driving when I called. They pulled into a Lowe's parking lot. Then, spent the next 30 minutes sitting in that parking lot talking me down off the cliff.

In just the first couple of minutes, I knew they understood what I was facing: "I know what you're talking about, and it sucks. But I don't think it's as huge an issue as you think right now." (Yes, the lawyer in me took notes during the call in the hope they would help me afterwards.)

My friend explained how they've come to accept their own illnesses. "I used to be embarrassed by it. Now, I know that's part of who I am. It doesn't mean I'm an outcast—it actually makes me more normal. Let's face it, everybody has *something* if they're truly honest."

We probed why I felt this way and whether that mattered. They helped me put it in context, reminding me, "There's a lot of people in the world who have these problems." And supporting my courage to tell the truth: "Those who can admit it are doing better."

When that call started, I was in full catastrophe mode. In the hours after I got off the witness stand, I had already convinced myself that public broadcasting of my eating disorders would ruin my practice and stop referrals.

My colleague straightened me out. "Your reputation is already pretty damn built." That line was repeated at least three times, and then my fear was turned on its head: "Hell, you might even get more business because people will understand you get it and know what you're talking about."

"I used to be embarrassed by it. Now, I know that's part of who I am. It doesn't mean I'm an outcast—it actually makes me more normal."

My volunteer helped me see that this is an opportunity for growth: "Owning our own problems is the only way we can help others. When they see that somebody who has succeeded in life has the same problems, and has dealt with them, they are more willing to listen and get help for themselves."

My friend was right, of course. So, I'm taking the next step and going public—widely—by writing this article and using it as a recovery tool.

If you need help with eating disorders, feel free to pick up the phone and call me. I know how the "gotta-gotta-gotta" obsession works. I know the body shame (I still think I'm too fat to be bulimic). I've done every form of abusive food behavior short of pumping my own stomach. I know the white-knuckle challenge when the obsession hits. I know the terror over what you've just done—or what you are about to do.

People with eating disorders use food behaviors to deal with uncomfortable or painful emotions. Restricting food can help you feel in control. Overeating can soften fear and soothe sadness and anger. Purging can expel feelings of helplessness and self-loathing.

If you are blessed with no food obsessions, you may wonder how to help a colleague who has an eating disorder. Or someone you suspect may have an eating disorder. A few suggestions:

1. Don't say "I know how you feel." You really don't.
2. Don't make 'suggestions' to help with weight management, exercise, or appearance. Those can trigger the shame.
3. Don't talk about your own diet in front of them. Or your recent weight loss. Or weight gain.
4. Don't push them to eat or avoid particular foods.
5. Don't try to educate them on healthy eating. Most of us have extensive knowledge on proper nutrition; we just have trouble applying it.
6. Don't succumb to the blame game. You are not to blame. They are not to blame. This is an illness, not a moral deficiency.
7. It's okay to ask how they are feeling and what they are thinking, but don't try to solve the problem.
8. Ask what you can do to help. If the answer is "nothing" or "leave me alone," let them know you are there if they need you. Then step back. Leave them alone—at least for a bit.
9. Treat them like a person—not a behavior, not an illness.
10. If they're a law student or attorney, encourage them to call JLAP.

The Indiana Judges and Lawyers Assistance Program (JLAP) is an agency of the Indiana Supreme Court. By Supreme Court rule, communications with JLAP are confidential and are not reported to anyone, including the Disciplinary Commission and the Supreme Court. Lawyers, judges, and law students can find help at JLAP for issues related to substance abuse, isolation, depression eating disorders, and other mental health issues. Terry Harrell is the Executive Director. JLAP can be reached at 317-833-0370.



Donna J. Bays is a Certified Family Law Specialist (by the Family Law Certification Board) at Bays Family Law in Zionsville. She received the Gale M. Phelps Award and is in the GP Hall of Fame. She served on the Board of Governors (2017–2019) and has chaired the Solo & Small Firm Conference and the Family and Juvenile Law Section.



By Joel M. Schumm

JUSTICES DIVIDED ON APPEAL WAIVERS AND "FORCIBLY" RESISTING

During April and May, the Indiana Supreme Court decided cases involving appeal waivers, life without parole sentences, retroactivity in juvenile delinquency proceedings, and "forcibly" resisting law enforcement. The Court of Appeals issued opinions addressing the effect of discovery delays in ensuring a speedy trial, a twenty-three-year delay in filing charges, and a lengthy sentence for misdemeanor convictions.

CHALLENGES TO SENTENCING APPEAL WAIVERS MUST BE RAISED IN A POST-CONVICTION RELIEF PROCEEDING, NOT ON DIRECT APPEAL

Defendants have a constitutional right to appeal their sentences, Ind. Const. art. 7, §§ 4, 6, but they may waive that right so long as their waiver is knowing and voluntary. *Creech v. State*, 887 N.E.2d 73, 74 (Ind. 2008). In the decade and a half since *Creech*, many prosecutors have included such waivers in plea agreements, which have generally been upheld on appeal unless the language was ambiguous or the trial court gave conflicting advisements during the plea colloquy. *See generally* Joel M. Schumm & Riley L. Parr, *Recent Developments in Indiana Criminal Law and Procedure*, 54 Ind. L. Rev. 851, 870 (2022).

Davis v. State, 207 N.E.3d 1183, 1184 (Ind. 2023), broke new ground in holding that, even if a trial court made conflicting statements before accepting a guilty plea that

may have misled a defendant, the "remedy is to vacate his conviction through postconviction proceedings, not to nullify his appeal waiver through a direct appeal." Moreover, "the remedy of setting aside the conviction would result in Davis invalidating the entire plea agreement rather than allowing him to retain its benefits while escaping its burdens." *Id.* at 1188.

Justice Goff, joined by Chief Justice Rush, dissented, concluding that the appeal waiver was unenforceable "because Davis was affirmatively advised by the trial court, before entry of his guilty plea, that he would retain the right to appeal." *Id.* at 1190. Because appeal waivers can be severed from the rest of a plea agreement, the defendant "should be allowed his appeal, rather than having to make an 'all or nothing' challenge to his plea." *Id.*

LIFE WITHOUT PAROLE SENTENCE AFFIRMED

The justices rejected two challenges to a life without parole (LWOP) sentence in *Oberhansley v. State*, 208 N.E.3d 1261 (Ind. 2023).

First, it found the "jury's LWOP recommendation implicitly reflected the necessary determination" that the aggravating circumstances outweighed the mitigating circumstances—a statutory prerequisite for an LWOP sentence. *Id.* at 1265. It also declined to revise the sentence as inappropriate considering his severe mental illness; neither his character, reflected in his lengthy criminal history and drug use on the day of the crime, nor the nature of his crimes, which he conceded was "horrific," warranted a reduction. *Id.* at 1271-72.

JUSTICES DIVIDE OVER THE CIVIL NATURE OF JUVENILE DELINQUENCY PROCEEDINGS IN DECIDING RETROACTIVITY

In *K.C.G. v. State*, 156 N.E.3d 1281, 1283 (Ind. 2020), the court held that, because the dangerous-possession-of-a-firearm statute applied "only to children," the offense could never be "committed by an adult"; thus, juvenile courts lacked subject-matter jurisdiction to adjudicate alleged violations of the statute.

M.H. v. State, 207 N.E.3d 412 (Ind. 2023), addressed as an issue of first impression whether the jurisdictional rule of *K.C.G.* should apply retroactively to collaterally attack a delinquency adjudication. Applying the same approach used in (adult) criminal post-conviction claims, the majority concluded that *K.C.G.* did not apply retroactively. Notably, the majority relied on criminal law precedent, while acknowledging that juvenile delinquency proceedings are often referred to as civil or "quasi criminal" with "parallels . . . between Indiana's criminal and juvenile systems." *Id.* at 419 (quoting *A.M. v. State*, 134 N.E.3d 361, 366 (Ind. 2019)).

Justice Slaughter, joined by Justice Massa in dissent, noted that the court had "repeatedly held that juvenile cases are civil proceedings subject to civil procedures" and opined that post-judgment relief for juvenile adjudications should therefore not be subject to the retroactivity rules that apply to collateral criminal proceedings. *Id.* at 427-28.

"FORCIBLY" RESISTING REQUIRES CLARIFICATION

Indiana's resisting law enforcement statute requires that a person "forcibly" resist, obstruct, or interfere with law enforcement. Ind. Code § 35-44.1-3-1(a)(1). In a memorandum decision, the majority of a Court of Appeals' panel found a defendant acted forcibly when she "slammed" shut her slightly ajar apartment door—making no contact with a police officer—after the officer expressed intent to arrest her. *Evans v. State*, No. 22A-CR-174, 2022 WL 16630780, at *3 (Ind. Ct. App. Nov. 2, 2022).

The Indiana Supreme Court denied transfer by a 3-2 vote. Chief Justice Rush, joined by Justice Slaughter,

ON THE MOVE

Stephanie L. Kroeger has joined the general litigation group at **Ruckelshaus Kautzman Blackwell Bemis Duncan & Merchant, LLP** in Indianapolis.

Ms. Kroeger is a December 2022 graduate of IU McKinney School of Law and has clerked with the firm since 2021. She will focus her practice in civil and criminal litigation, in particular in personal injury and in servicing the public safety clientele of RKB.

135 N. Pennsylvania Street, Suite 1600
Indianapolis, IN 46204

317-634-4356

rkblegalgroup.com

MEMBER ANNOUNCEMENT

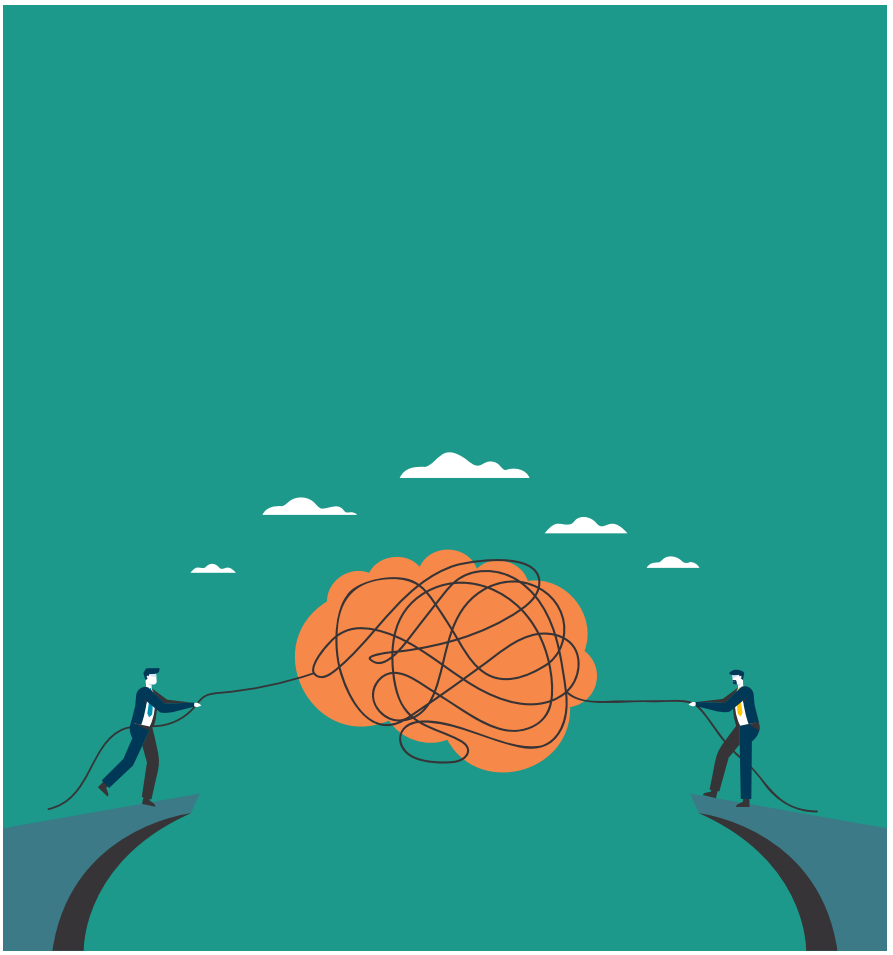
dissented from the denial of transfer, writing that the Court of Appeals' majority had applied too low of a bar and that "persisting confusion" on the issue warranted a grant of transfer to provide guidance and a "simpler inquiry." *Evans v. State*, 207 N.E.3d 428, 429 (Ind. 2023) (dissent from denial of transfer). Specifically, in her view, the court should "adopt a standard requiring the evidence to establish that (1) the threat is directed at the officer, and (2) the defendant's action, viewed **objectively**, threatened the use of force—that is, an act of violence." *Id.* (citing *Tyson v. State*, 149 N.E.3d 1186, 1186 (Ind. 2020) (Rush, C.J., dissenting from denial of transfer) (Slaughter, J., joining)).

COURT OF APPEALS' OPINIONS

STATE'S DELAY IN PROVIDING DISCOVERY RESULTS IN DISCHARGE UNDER SPEEDY TRIAL RULE

In *Wellman v. State*, No. 22A-CR-1673, 2023 WL 3329650 (Ind. Ct. App. May 10, 2023), a defendant charged with alcohol-related driving offenses requested several continuances because the State failed to provide the results of a blood test from the night of his arrest. After thirteen months of waiting, he moved for discharge under Indiana Criminal Rule 4(C), which the trial court denied. *Id.* at *1.

The Court of Appeals reversed. Rule 4(C) requires the State to bring a defendant to trial within one year, although delays effected by a defendant's motion for a continuance are excluded. Nevertheless, Indiana courts have long recognized an exception—termed "the discovery exception" in *Wellman*—when a continuance is caused by the State's delay in providing discovery. *Id.* at *3 (quoting *Carr v. State*, 934 N.E.2d 1096 (Ind. 2010) ("When a trial court grants a defendant's motion for continuance because of the State's failure to comply with the defendant's discovery requests, the resulting delay is not chargeable to the defendant.")). The court rejected the State's argument that the delay should be attributed to the defendant because he requested the continuances, declining to follow the State's cited authority that did not reference earlier cases or address the discovery exception. *Id.* at *4.



TWENTY-THREE-YEAR DELAY IN FILING MURDER CHARGES DID NOT VIOLATE DUE PROCESS

Prosecutors have discretion when to bring charges, but a lengthy pre-indictment delay in prosecution can result in a Due Process Clause violation. *Ackerman v. State*, 51 N.E.3d 171, 189 (Ind. 2016). In such cases

> the defendant has the burden of proving that he suffered actual and substantial prejudice to his right to a fair trial, and upon meeting that burden must then demonstrate that the State had no justification for delay, which may be demonstrated by showing that the State delayed the indictment to gain a tactical advantage or for some other impermissible reason.

Id. at 189-90 (cleaned up).

In *Higgason v. State*, No. 22A-CR-2000, 2023 WL 3557385, at *7 (Ind. Ct. App. May 19, 2023), the court found the State was justified



in waiting twenty-three years to file charges in a triple homicide case. The State needed additional evidence that "could not be gathered at the time of the crime." *Id.* at *7. Although DNA was collected from under one of the victim's fingernails in 1998, DNA testing was not as advanced as it became by 2020, when the results showed the defendant was a contributor to the DNA. Therefore, "the State had a justifiable explanation for its delay and the delay did not occur to gain a tactical advantage." *Id.*

DIVIDED PANEL REDUCES 3,000-DAY SENTENCE FOR TEN MISDEMEANOR CONVICTIONS

A defendant convicted of ten counts of Class A misdemeanor invasion of privacy was sentenced to consecutive terms of 300 days on each count for a total sentence of more than eight years. *Lane v. State*, No. 22A-CR-2276, 2023 WL 3637001 (Ind. Ct. App. May 25, 2023)

The majority characterized the offenses as writing "letters to his ex-wife A.N. ten times in violation of a no-contact order. The content of the letters was nonthreatening and primarily revolved around questions about the parties' children." *Id.* at *2. Applying its "well-settled function" in reviewing sentences under Appellate Rule 7(B) "to leaven the outliers and apply the law in a dispassionate and evenhanded manner," the majority remanded the case for revision to a 300-day sentence by ordering the counts be served concurrently.

Judge Kenworthy dissented and would have upheld the sentence, relying on the "nearly two decades of abuse" by the defendant and the deference afforded to trial courts under Rule 7(B). *Id.* at *4, 7-8.



ETHICS

By Adrienne Meiring

PROFESSIONAL CONDUCT RULE 3.8(D): THE DEBATE CONTINUES ON THE ETHICAL STANDARD FOR DISCLOSURE

Academics, courts, and disciplinary authorities have debated for years whether a prosecutor's ethical duty to disclose information under professional conduct rules is coextensive with the disclosure requirements of *Brady v. Maryland*.[1] This question has once again come to the forefront with *Attorney Grievance Commission of Maryland v. Cassilly*.[2] In a matter of first impression, the Court of Appeals of Maryland disbarred a former state's attorney, holding that a prosecutor's duty under the state's professional conduct rule to disclose exculpatory information continues post-conviction.[3]

THE NATIONAL LANDSCAPE

The U.S. Supreme Court ruled in *Brady v. Maryland* and its progeny that due process requires prosecutors to provide the defense with any favorable evidence material to guilt, punishment, or impeachment.[4] To establish that the state committed a *Brady* violation, a defendant must show: (1) the evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the state suppressed the evidence, either willfully or inadvertently; and (3) prejudice ensued (because the evidence is material).[5]

"The language detailing the constitutional and regulatory standards for disclosure sound similar, but courts have sharply disagreed whether a prosecutor's ethical disclosure obligation is the same as the materiality standard of *Brady* or if it creates a more expansive requirement."

The ABA's Model Rule of Professional Conduct 3.8(d) (which Maryland's and Indiana's rules mirror) requires a prosecutor to timely disclose to the defense:

> [A]ll evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information…[6]

The language detailing the constitutional and regulatory standards for disclosure sound similar, but courts have sharply disagreed whether a prosecutor's ethical disclosure obligation is the same as the materiality standard of *Brady* or if it creates a more expansive requirement.

The ABA Committee on Ethics and Professional Responsibility attempted to clear up the issue in its 2009 Advisory Opinion 09-454, stating that Rule 3.8(d)'s duty is separate from disclosure obligations imposed under the Constitution, statutes, and other rules.[7] Acknowledging that Rule 3.8(d) had been described as codifying *Brady*, the committee announced this to be an inaccurate description, as the Model Rule does not include a materiality limitation but rather requires prosecutors to disclose *any* favorable evidence so the defense can decide its relevance.[8] In sum, the committee opined that Rule 3.8(d) is more demanding than the constitutional mandate.[9]

Notwithstanding the ABA's advisory opinion, state courts in Colorado, Louisiana, Ohio, Oklahoma, and Wisconsin have held that Rule 3.8(d)'s obligations are synonymous with *Brady*.[10] In *In re Seastrunk*, the Louisiana Supreme Court captured the prevailing concerns, reasoning that application of a broader interpretation to Rule 3.8(d) would create uncertainty for prosecutors between legal and ethical duties and would invite use of the ethical rule as a tactical weapon in criminal litigation.[11]

Even for jurisdictions that have found the two obligations independent, several have determined that, unlike *Brady*, there must be a showing the prosecutor had actual knowledge of the exculpatory evidence and intentionally suppressed the information to be in violation of Rule 3.8(d).[12] Yet another approach was articulated in *In re Disciplinary Action Against Feland*, when the North Dakota Supreme Court determined that not only does Rule 3.8(d) impose broader duties than *Brady*, but the reach of the rule also applies to negligent failures to disclose, not just intentional ones.[13]

THE *CASSILLY* CASE

Against this national backdrop, the Court of Appeals of Maryland was called upon to determine whether former state's attorney Joseph Cassilly violated Maryland's version of Rule 3.8(d) by failing to provide an FBI report and letters from the Department of Justice (DOJ) criticizing the work and credibility of an important witness in *State v. Huffington*. The wrinkle is that the information was received over a decade after Huffington's conviction and appeal.[14]

John Huffington was convicted in 1981 on two counts of felony murder, primarily on his co-defendant's testimony. On appeal, his case was remanded for a new trial. In Huffington's second trial, the co-defendant again testified, but the state also called FBI Agent Michael Malone, an expert in forensic testing, to corroborate the co-defendant's testimony that Huffington was at the murder scene. Agent Malone testified that hair samples recovered at the scene microscopically matched Huffington's head hairs. Huffington again was convicted. Cassilly served as trial counsel in both trials.

In April 1997, the DOJ's Office of Inspector General (OIG) issued a report criticizing 13 FBI lab examiners, including Malone. The 1997 report included a section

specifically concluding that Malone had testified falsely in another case. Huffington's counsel and Cassilly received a copy of this report.[15]

The DOJ then established a task force and hired forensic scientists to conduct independent reviews of the 13 criticized examiners' work. In 1999, an independent examiner issued the "Robertson Report," indicating that he was unable to determine whether Agent Malone performed appropriate tests in a scientifically acceptable manner in the Huffington case and that Malone's results were not adequately documented in his notes. Cassilly was provided with a copy of the Robertson report but did not turn it over to the defense.[16]

In 2014, special counsel to the DOJ wrote letters to the elected prosecutor concerning errors identified in Huffington's case. These letters were forwarded to Cassilly, but Cassilly did not disclose them to defense counsel. Throughout this time, Huffington continued his pursuit for post-conviction relief, filing various petitions with the trial court. In 2016, Huffington was scheduled for a third trial, but Cassilly never disclosed the Robertson report or the DOJ letters to the defense and made misrepresentations to the trial court about the opinions expressed in the Robertson report after the defense obtained the information independently.[17]

Cassilly argued in his subsequent disciplinary matter that the Robertson report was not exculpatory. The Maryland Court of Appeals quickly dispatched that argument, moving on to whether Rule 3.8(d) applies to post-conviction proceedings.[18] Examining the plain language of the rule, the court noted Rule 3.8(d) "neither excludes



ON THE MOVE

Cassie Hendrickson has joined the litigation group at **Slovin & Associates Co., LPA** in Cincinnati, Ohio.

Cassie graduated cum lade from Indiana University Robert H. McKinney School of Law last Spring and was admitted to the Indiana State Bar in October. Cassie moved to Cincinnati and joined the firm in June 2022, and she practices creditor's rights law and litigation, commercial litigation, and landlord-tenant law.

2060 Reading Road, Suite 420
Cincinnati, Ohio 45202

513-683-9000

sclpa.com

MEMBER ANNOUNCEMENT

"While courts are reluctant to impose on prosecutors a more expansive ethical duty than required by law, courts apparently do not want to foreclose that possibility for an egregious case."

nor includes postconviction proceedings"; instead, it imposes an obligation to disclose all evidence that tends to negate guilt or mitigates the offense.[19]

The court next examined Comment 1 to Rule 3.8, which provides that "[a] prosecutor has the responsibility of a minister of justice" and that "responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[20] The court reasoned that the rule's plain language, its rulemaking history, and the policy considerations in the comment support the conclusion that a prosecutor's disclosure obligations under Rule 3.8(d) apply at any stage of the proceedings in which a defendant challenges guilt, including post-conviction relief.[21]

Based on this analysis, the court determined Cassilly was in violation of 3.8(d). Further, his misrepresentations to the trial court about the contents of the Robertson report warranted disbarment.

IMPACT OF *CASSILLY* AND INDIANA'S STANCE

Although *Cassilly* broke new ethical ground by holding that Rule 3.8's obligations apply to post-conviction proceedings, the appellate court expressly did not address bar counsel's request to hold that Rule 3.8(d)'s scope exceeds the disclosure obligations under *Brady*. As Judge McDonald wrote in his concurring opinion in *Cassilly*, "[T]hat issue… remains for another day."[22]

So where does Indiana stand? Like many jurisdictions, Indiana remains undecided. In *Matter of Hudson*, the Indiana Supreme Court found that a respondent-prosecutor's intentional failure to disclose a witness recantation violated Rule 3.8(d).[23] In a footnote, the court identified the national divergence of opinion regarding the breadth of Rule 3.8's obligation, citing to both *Seastrunk* and *Feland*. However, the court declined to choose between the two approaches, as Hudson's conduct violated Rule 3.8(d) under either approach.[24]

This leaves prosecutors in an ethical quandary. However, declining to answer is an answer. While courts are reluctant to impose on prosecutors a more expansive ethical duty than required by law, courts apparently do not want to foreclose that possibility for an egregious case. For the ethically minded prosecutor, the lasting impact of *Cassilly* may simply be this: When in doubt, disclose—no matter what stage of the proceedings.

Adrienne Meiring is the executive director of the Office of Judicial and Attorney Regulation.

ENDNOTES

1. *See* Fern L. Kletter, *Whether Rule of Professional Conduct Governing Prosecutor's Disclosure Obligations Is Coextensive with Brady Standard for Disclosure of Exculpatory Evidence and Factual Applications*, 44 A.L.R. 7th Art. 4 (2019).
2. 262 A.3d 272 (Md. 2021).
3. *Id.*
4. 373 U.S. 83 (1963).
5. *Id.* at 87; *U.S. v. Bagley*, 473 U.S. 667 (1985).
6. Model Prof. Cond. R. 3.8(d).
7. ABA Formal Adv. Op. 09-454 (July 8, 2009).
8. *Id.*
9. *Id.*
10. *See* cases cited in *Prosecutor's Disclosure Obligations*, 44 A.L.R. 7th at §4.
11. 236 So. 3d 509 (La. 2017).
12. *Prosecutor's Disclosure Obligation*, 44 A.L.R. 7th at § 6, 7 (District of Columbia, New York, Texas, and Virginia require showing of actual knowledge; Colorado and District of Columbia require an intentional failure to disclose).
13. 820 N.W.2d 674 (N.D. 2012).
14. *Cassilly*, 262 A. 3d at 278.
15. *Id.* at 281-82.
16. *Id.* at 282-83.
17. *Id.* at 284-88.
18. *Id.* at 304-05.
19. *Id.* at 308.
20. *Id.*
21. *Id.* at 309-19.
22. *Id.* at 332.
23. 105 N.E.3d 1089 (Ind. 2018).
24. *Id.* at 1092 fn.2.



By Dakota C. Slaughter and Farrah Goodall

APRIL AND MAY CASES DISCUSS NEGLIGENCE, MEDICAL MALPRACTICE, AND MORE

The Indiana Supreme Court did not issue any civil opinions in either April or May 2023, but granted transfer in eight civil cases. The Indiana Court of Appeals published 24 civil opinions in the two months. This article highlights four civil transfer grants and six Court of Appeals opinions. The full text of all Indiana appellate court decisions, including those issued not-for-publication, are available via Fastcase at www.inbar.org/fastcase or the Indiana Courts website, www.in.gov/judiciary/opinions.

INDIANA SUPREME COURT TRANSFER GRANTS

Z.D. V. COMMUNITY HEALTH NETWORK, 197 N.E.3D 330 (IND. CT. APP. 2022)

A healthcare provider could not reach a patient by telephone to notify the patient of her medical testing results, so one of the provider's employees wrote a letter to the patient detailing her results and diagnosis. The letter, addressed to the patient, was placed in an envelope addressed to a high school classmate of the patient's teenage daughter. The classmate, unauthorized to receive the letter, posted the letter on Facebook. Disclosure of the diagnosis had adverse effects on the patient's reputation and livelihood.



The patient sued the healthcare provider for variations of negligence and vicarious liability for the employee's actions. The trial court concluded that the patient could not recover damages for loss of privacy because she did not specifically plead an invasion of privacy claim. The Court of Appeals recognized that the patient's complaint alleged that the healthcare provider's employee distributed private health information to an unauthorized person and the general public, and construed the allegations as an invasion of privacy claim under notice pleading. The court further explained that in the interim of the appeal, the Indiana Supreme Court recognized a tort claim for invasion of privacy based on public disclosure of private facts, adopting the Restatement (Second) of Torts § 652D. *Cmty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368 (Ind. 2022). The Indiana Supreme Court granted transfer in *Z.D.* on May 4, 2023. 2023 WL 3354920.

ZARAGOZA V. WEXFORD OF INDIANA LLC, 194 N.E.3D 621 (IND. CT. APP. 2022) (TABLE DECISION)

A DOC inmate diagnosed with hypothyroidism was allergic to his prescribed medication, resulting in various adverse side effects. The inmate sued the medical care company serving the inmate's DOC facility and several of the employed doctors, alleging medical malpractice and an Eighth Amendment violation (via a § 1983 claim). When the defendant-company and doctors moved for summary judgment, the inmate designated an affidavit from another physician, who opined that the company's doctors had departed from the standard of care with the particular prescription.

Affirming the trial court's grant of summary judgment, the Court of Appeals first explained that with respect to the medical malpractice claim, the physician's affidavit was deficient in several respects and therefore insufficient to establish any genuine issues of material fact; namely, the affidavit did not contain enough information regarding reliable scientific principles under Evidence Rule 702. As to the Eighth Amendment issue, after noting that a private company can be vicariously liable under § 1983 for its employee's actions under color of state law, the court reasoned that prescribing a medication with adverse side effects does not amount to cruel and unusual punishment, and moreover, that the physician's affidavit did not aver facts establishing that the treating doctors acted with deliberate indifference. The Indiana Supreme Court granted transfer on April 14, 2023. 208 N.E.3d 1256 (Ind. 2023).

KORAKIS V. MEMORIAL HOSPITAL OF SOUTH BEND, 198 N.E.3D 415 (IND. CT. APP. 2022)

Following a car accident, the plaintiff brought a medical malpractice action against two treating doctors and the hospital, alleging failure to diagnose the full extent of her injuries—specifically, an elbow fracture, not an acute soft tissue injury. A Medical Review Panel opined that the evidence did not support the conclusion that the doctors failed to meet the applicable standard of care. Relying on the Panel's opinion, the doctors and the hospital moved for summary judgment. In response, the plaintiff designated an expert affidavit of an orthopedic doctor.

The trial court granted summary judgment, finding the expert affidavit insufficient to establish a genuine issue of material fact. The Court of Appeals affirmed, identifying several deficiencies with the affidavit. For one, the affidavit addressed the conduct of only one of the defendant-doctors, not the other defendant-doctor nor the hospital. Second, even as to the implicated defendant-doctor, the affidavit did not state whether the expert

orthopedic was familiar with the applicable standard of care for the circumstances. The Indiana Supreme Court granted transfer on April 27, 2023. 208 N.E.3d 1256 (Ind. 2023.)

LAND V. IU CREDIT UNION, 2022 WL 17998807 (IND. CT. APP. 2022)

A credit union's membership agreement provided that "the terms of this Agreement are subject to change at any time." The credit union later mailed and indirectly emailed an addendum to that agreement that included an arbitration provision and ability to opt out. Later, a member (who did not opt out) sued the credit union on behalf of a putative class for overdraft fee practices. The credit union moved to compel arbitration pursuant to the addendum.

The Court of Appeals reversed the trial court's grant of the motion to compel arbitration based on contract formation issues. Since then, the Indiana Supreme Court issued its opinion *Decker v. Star Financial Group, Inc.*, 204 N.E.3d 918 (Ind. 2023), where, under strikingly similar facts, the court concluded that an account agreement that allowed a bank to "change any term of this agreement" meant the bank could only modify the terms that existed in that very original account agreement. The court granted transfer in *Land* on May 4, 2023. 2023 WL 3354924.

INDIANA COURT OF APPEALS

RAINEY V. INDIANA ELECTION COMM'N, 208 N.E.3D 641 (IND. CT. APP. 2023); *BOOKWALTER V. INDIANA ELECTION COMM'N*, 209 N.E.3D 438 (IND. CT. APP. 2023)

These two cases, issued eight days apart by separate panels, share similar facts and outcomes: Hopeful congressional candidates in the May 2022 Republican Party failed to establish political party affiliation pursuant to I.C. § 3-8-2-7 with either (a) votes in the two most recent party primaries; or (b) certification from the party's county chairman. Some challenged the candidacy with the Indiana Election Commission, and the Commission upheld the challenge. The hopeful candidates petitioned for judicial review. Respectively, one trial court dismissed, while the other denied preliminary relief. The Court of Appeals separately affirmed both entries, as the matters had been rendered moot since the primary election had already occurred.

EVANSVILLE AUTO., LLC V. LABNO-FRITCHLEY, 207 N.E.3D 447 (IND. CT. APP. 2023); *SUPERIOR OIL CO., INC. V. LABNO-FRITCHLEY*, 207 N.E.3D 456 (IND. CT. APP. 2023)

These two cases share the same underlying facts and were issued on the same day with the same authoring judge. An industrial chemical company manufactures an automotive brake cleaning solution. Stored in 55-gallon metal drums, the solution is highly flammable. A man, trained in hot works and fire prevention, attempted to remove the top of one of the drums with a cutting torch, despite the warning label on top of the drum with a prominent red pictogram indicating "FLAMMABLE LIQUID." The top exploded, fatally for the man. His widow sued, among others, the chemical company and one of its customers who had obtained the drum along the supply chain for negligence and violations of the Indiana Products Liability Act.

As to the chemical company, the Court of Appeals concluded that the warning was prominent and emphatic enough that it resulted in unforeseeable misuse of the product, an affirmative defense to the Act. And as for the customer company, the court similarly concluded that the man was more than 50% at fault as a matter of law. The decisions respectively reversed the trial court's denials of summary judgment.

SPALDING V. UTICA TWP. VOLUNTEER FIRE ASS'N, 209 N.E.3D 483 (IND. CT. APP. 2023)

Affirming denial of motion for change of venue from Clark County Superior Court in non-compete dispute where agreement provision provided for "express[] consent to the personal jurisdiction of the state courts located in Clark County."

FORD V. SLATE, 209 N.E.3D 1 (IND. CT. APP. 2023)

Agreement between employee and employer regarding certain employment conditions was enforceable contract despite employee's at-will status; at-will employment relationship refers to indefinite term of employment, so parties may contract for other conditions of employment.

Dakota C. Slaughter is an associate at Bose McKinney & Evans LLP in the Litigation Group. Mr. Slaughter received his J.D. from the University of Alabama School of Law and his MBA from the University of Texas Rio Grande Valley. While in law school, Mr. Slaughter served as President of the Student Bar Association, Publication Chair of the Law & Psychology Review, and a member of the Moot Court Board. His email is DSlaughter@boselaw.com.

Farrah Goodall is a summer associate at Bose McKinney & Evans LLP and a rising 2L at the Indiana University Robert H. McKinney School of Law. While in law school, Ms. Goodall serves as an active member of the legal honor society Phi Delta Phi, the Women's Caucus, and as a Student Ambassador. Her email is FGoodall@boselaw.com.

PROFESSIONAL MARKETPLACE

EMPLOYMENT DESIRED

General Civil Practice

CALIFORNIA LAWYER since 1966. AV rated. Member ISBA. Father and brother practiced in Marion. Enjoys interacting with Indiana lawyers. Handles transactions, ancillary probates, and litigation in CA and federal courts.
John R. Browne III, a Professional Corporation
John R. Browne, III
2121 N California Blvd, Ste 875, Walnut Creek, CA 94596
925-433-7225 | jbrownelaw@gmail.com
www.johnbrownelaw.com

FLORIDA PROBATE & PROPERTY AV Rated Attorney. Member ISBA. Ancillary probates, real estate transactions, real estate development, and litigation.
Robert J. Stanz PA | Robert J. Stanz, Esq.
5121 S Lakeland Dr, Lakeland, FL 33813
888-478-2695 | rjstanz@stanzlaw.com

INDIANAPOLIS IMMIGRATION attorney seeks professional or co-counsel positions with Indiana attorneys in the practice of immigration law. Over 25 years' experience in immigration. Will handle adjustment of status, change of status, labor certificates, and other matters. Also, will attend interviews at Indianapolis Immigration Office.
Lewis & Kappes, P.C. | Thomas R. Ruge
317-639-1210 | smiller@lewiskappes.com

WORKER'S COMPENSATION Indianapolis attorney Charles A. Carlock seeks referrals on Workers' Compensation cases statewide.
Carlock Legal | Charles A. Carlock
317-573-5282 or 844-415-1461

SPECIAL SERVICES

Fiduciary Services

ARROW FIDUCIARY SERVICES is now taking new clients. We focus on being your appointed Independent
- *Attorney-in-Fact,*
- *Guardian,*
- *Trustee, and*
- *Executor.*

Arrow Fiduciary Services | Kate Borkowski, JD
Office: 6451 Oaklandon Rd, Indianapolis, IN 46236
Mailing: 11715 Fox Rd, Ste 400-225, Indianapolis, IN 46236
317-840-6525 | Fax: 317-855-1371
kate@arrowfiduciaryservices.com
arrowfiduciaryservices.com

ARROW FIDUCIARY SERVICES

Please support the advertisers seen here in the Professional Marketplace. Check out our featured listings online at www.inbar.org.

Want to be featured in next month's issue of *Res Gestae*? For details, please contact LLM Publications at 503-445-2221 or ads@llmpubs.com

Trust is earned.

That's why we listen, advise and manage your wealth as if it were our own. We would love the opportunity to earn your trust.



Kate Miller, CTFA
President, Private Advisory



Erika Dornseif, CTFA
SVP, Senior Trust Officer



Matt Henry, CFA
VP, Senior Investment Officer



Matt Lewis, J.D.
VP, Senior Trust Officer



Tim Annee
Investment Officer



Medina Habibic
Investment Officer



Rachael Rice
Trust Officer



Alison Silvey, CTFA
Trust Administrator

Indiana Born for Indiana Banking. Since 1943.

SCAN TO SEE HOW WE CAN HELP

STAR

Bank | Insurance | Private Advisory

80 YEARS STAR

*Terms and conditions may apply. Products are: *Not FDIC insured *May lose value *Not financial institution guaranteed *Not a deposit *Not insured by any federal government agency. ©2023 STAR Financial Bank

starfinancial.com

RES GESTÆ
Indiana State Bar Association
201 N. Illinois St., Suite 1225
Indianapolis, IN 46204

CHANGE SERVICE REQUESTED



We Can't Predict the Future, But We Can Insure It

A Full Suite of Insurance Solutions.
For You & Your Practice.

As the endorsed insurance provider of the ISBA, we offer a complete range of insurance solutions covering all of your business needs.

Business Insurance:

- Lawyers Professional Liability
- Cyber Liability
- EPLI
- Crime
- D&O
- Workers Compensation
- Fiduciary Liability
- Commerical Auto
- Bonds
- General Liability/Property
- Umbrella

Call today for more information on the insurance products available to Indiana State Bar Association members.

1.800.581.8810

www.usiaffinity.com/ritman

RITMAN
A USI Affinity Company